IN THE

Supreme Court of the United States

October Term 1944

No. 680

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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Opinion of the Court Below

The opinion of the majority of the Circuit Court of Appeals (R. 527-541) is reported in 144 F. (2d) 211, and the separate opinion of Circuit Judge MAJOR (R. 541-542) is reported at page 221.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. Code, Section 347), on the ground that this is a proceeding

to review a decision of the Circuit Court of Appeals for the Seventh Circuit, that Section 240 provides for review on certiorari of such decisions, that the issues here merit review of the decision below and that a petition for a writ of certiorari was seasonably filed by petitioners on November 15, 1944.

The jurisdiction of the Circuit Court of Appeals for the Seventh Circuit rested on the provisions of Section 11 of the Clayton Act, as amended, 38 Stat. 734, 43 Stat. 939, 48 Stat. 1102, 52 Stat. 1028 (15 U. S. Code, Section 21). This Section provides that any party required by an order of the Federal Trade Commission "to cease and desist from a violation (of the Clayton Act) charged" may obtain a review of such order in an appropriate Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission be set aside.

Statement of the Case

The Action

This is an action to review a determination and order of the Federal Trade Commission. It was instituted by petitioners by filing, pursuant to Section 11 of the Clayton Act, above referred to, in the Circuit Court of Appeals for the Seventh Circuit a petition praying that the Court set aside an order of the Federal Trade Commission, dated March 16, 1942, ordering petitioners to cease and desist from certain practices charged by the Commission to be in violation of Sections 2 and 3 of the Clayton Act, as amended.* Thereafter the Federal Trade Commission, herein referred to as the Commission, filed in the Circuit Court of Appeals its cross-application under the same Section 11 of the Clayton Act, for a decree affirming the Commission's order and directing compliance therewith.

The Circuit Court of Appeals declined to set the order aside but modified it in certain respects, and by its decree

* The pertinent provisions of the Clayton Act are reproduced in Appendix A hereto.

dated September 18, 1944 (R. 586) it directed petitioners to obey the order as so modified. Circuit Judge MAJOR dissented. Petitioners applied for a rehearing (R. 543), which was denied (R. 593).

Thereupon, petitioners filed with this Court their petition for a writ of certiorari to review the decision and decree of the Circuit Court of Appeals. Certiorari was granted on December 18, 1944.

Petitioners and Their Competitors

Petitioners are engaged in the manufacture, sale and distribution of products and by-products made from corn, including glucose (corn syrup), dextrose (refined corn sugar), starches and gluten feeds. Their principal plant is at Argo, Illinois, within the switching limits of Chicago, and they have other plants at Pekin, Illinois, North Kansas City, Missouri, and Ridgefield, New Jersey* (R. 465).

The Complaints of and Proceedings Before the Federal Trade Commission

On October 21, 1938, the Commission issued a complaint charging in general terms that petitioners were, and since June 19, 1936 had been discriminating in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 19, 1936 (U. S. Code, Title 15, Section 13). Hearings were held at which counsel for the Commission, over objection, questioned officials of petitioners as to numerous matters not indicated by the complaint. Thereafter, the Commission filed an amended complaint which, in three counts, charged petitioners with violations of Sections 2(a), 2(e) and 3 of said Act. Further hearings were had, briefs were filed and the issues were argued orally before the Commission.

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* At the time of the proceedings before the Commission, petitioners had a plant at Edgewater, New Jersey, but this plant was taken over by the Government as a naval medical supply base and petitioners have moved the activities formerly conducted at this plant to a new plant at Ridgefield, New Jersey.

The Commission subsequently rendered its decision, finding that petitioners since June 19, 1936 had violated or were violating the Act in the respects hereafter described and ordering them to cease and desist from the violations so found.

The issues before this Court involve only the Commission's findings and order with respect to the alleged violations of Sections 2(a) and 2(e). Before the conclusion of the Commission proceeding, petitioners had discontinued the practices charged to be violative of Section 3. Consequently, although the appropriateness of a cease and desist order with regard to facts that no longer existed was challenged in the court below, the matter is of no substantial importance and therefore has not been brought before this Court.

There are here for decision several separate and distinct questions. It is as though there were several separate cases, since the provisions of Sections 2(a) and 2(e) are quite different and the findings of violations thereof rest upon totally different facts. Indeed, as will be seen, even under Section 2(a) alone there are several quite separate and distinct cases involving different facts. Therefore, it will clarify the presentation to state separately the case with respect to each alleged violation.

A. Alleged Violations of Section 2(a)

Section 2(a) provides, in part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due

allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

The Commission charged and found that several different practices of petitioners constituted discrimination in price between different purchasers within the prohibition of this provision. These practices can be conveniently referred to by, and the facts with reference thereto can be summarized under the following general headings:

1. Basing Point Prices,
2. Delayed Bookings and Deliveries,
3. Sales in Tank Car Quantities to Tank Wagon Customers,
4. Allowances and Discounts.

1. Basing Point Prices

The Facts

The issues under this heading relate to the sale and shipment in interstate commerce of glucose or corn syrup unmixed produced at petitioners' principal plant at Argo, Ill., in the Chicago Switching Limits and at its plant opened later at Kansas City, Mo.

Corn syrup unmixed (C. S. U.) in carloads is customarily sold under contracts permitting purchasers to take delivery at any time within from ten to thirty days of date of sale (R. 40, 205, 408).

Petitioners' principal plant at Argo began operation in 1910. Petitioners at that time determined the delivered price of their corn syrup in carloads at any destination by adding to the Chicago price the carload freight rate from Chicago to that destination. In 1922, petitioners opened another plant at Kansas City. Since then, whether syrup shipped to fulfill a particular order is forwarded from petitioners' Kansas City plant or from its Argo (Chicago) plant

has been entirely within petitioners' election, and the decision has depended upon conditions at the two plants. When they opened their Kansas City plant petitioners did not change their pricing method but continuously since 1910 they have uniformly employed the same method of determining their delivered prices at different destinations, the price to all customers at a given point being arrived at by adding to the Chicago base price the freight rate from Chicago to that point, whether the corn syrup delivered under their contracts was shipped from Kansas City or from Chicago (R. 195-197, 199).

Thus all buyers at a given destination are charged the same price regardless of point of shipment (R. 469-470).

Some of petitioners' customers are located at Chicago, Illinois; Kansas City, St. Joseph and Springfield, Missouri; Fort Smith, Arkansas; Hutchinson, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Waco, Sherman, and San Antonio, Texas; Denver, Colorado; and Salt Lake City, Utah (R. 195). The freight rates to these points were lower from Kansas City than from Chicago. (See Table, R. 197.) With the exception of a few sales, shipments to fulfill which were made from the plant at Chicago, Illinois, sales to purchasers located in the particular cities enumerated, other than Chicago, were customarily fulfilled by shipments from the plant at Kansas City, Missouri. Moreover, a substantial number of the sales to purchasers located in Chicago were fulfilled by deliveries out of petitioners' storage tanks in Chicago, to which glucose had been shipped by petitioners from both of their plants, while a few such sales were fulfilled by shipments to customers in Chicago directly from the Kansas City plant (R. 196).

Many of the purchasers located at the designated points also purchased glucose from competitors of petitioners (R. 195-196).

No testimony was offered by the Commission as to the effect of petitioners' pricing method, which was in general use in the industry, and of the delivered prices produced thereby upon competition and upon petitioners' customers,

but a stipulation was entered into between counsel for the Commission and counsel for petitioners which contains all there is in the record on this point. The pertinent portions of this stipulation are as follows:

"That purchasers located in the cities enumerated above are candy manufacturers who purchase glucose or corn syrup unmixed of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers, including chain stores, wholesalers and retailers, located in the various states of the United States. Such glucose or corn syrup unmixed is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from five to ninety per cent. of the finished weight thereof. Generally the syrup is used in greatest proportion in candies which are sold by such candy manufacturers at about a few cents per pound and at narrow margins of profit. The higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois, result to a greater or lesser degree in higher material costs than those of manufacturers in Chicago, the degree in each instance depending upon the difference in price and the proportion of syrup used in the particular candy manufactured. As to candies priced at but a few cents per pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per pound lower than a competitor. This is especially true in selling such candies to chain stores and other purchasers of large quantities, to whom such a small difference is determinative in placing their business. Under such circumstances, candy manufacturers paying the higher prices for such syrup than competitors may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a non-price or other basis. Unless other cost factors are present, the result in either case is to reduce profit *pro tanto*. This result may occur either directly through the absorption of higher syrup costs

in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery of the finished candies no matter how such differences are brought about." (R. 198-99)

There was no stipulation or proof that any candy manufacturers had knowledge that they were receiving the benefit of any discrimination in price.

Some of the candy manufacturers were located at the cities enumerated before the construction and operation of petitioners' Kansas City plant, and some candy manufacturers formerly located at said cities have, since 1922, relocated in Chicago (R. 199).

The Commission's Decision

The Commission found that price discrimination in violation of Section 2(a) had occurred whenever since June 19, 1936, petitioners, having sold at a delivered price made up of the Chicago base price plus freight from Chicago to a buyer's destination, had made delivery from petitioners' Kansas City plant and the freight rate from Kansas City was less than that from Chicago. (R. 464-488). Petitioners were ordered to cease and desist from the alleged discriminations (R. 489).

The Decision of the Court Below

The Circuit Court of Appeals, Judge Major dissenting, agreed with the Commission's decision and entered a decree directing obedience to this phase of its order. Judge Lindley in the majority opinion ruled that differences in delivered prices at different destinations resulting from the basing point pricing method constituted unlawful discrimination within the prohibition of Section 2(a). He rejected the contention of petitioners that the definite assurances

given in Congress by the Committee Chairman and others that the Robinson-Patman amendment to Section 2(a) would not outlaw basing point prices and that the striking from the bill of a clause which would definitely have had this effect required the conclusion that basing point prices did not come within the prohibition of Section 2(a). He remarked that the Congressional debates indicated "only disagreement between members of the Congress as to the desirability or the non-desirability of any such practice" and that the result was "utter silence in the Act upon that subject matter." He also rejected petitioners' contention that the Commission erred in going beyond the stipulation and indulging in a conclusion which was not stipulated as to the supposed effect of the pricing method upon competition. Despite the fact that there was no stipulation or proof whatever that any purchaser knew he was receiving the benefit of the alleged discrimination, Judge Lindley said that there was no lack of proof on this point (R. 530-533).

Judge Major disagreed and expressed the opinion that "a delivered price predicated on the basing point system does not * * * come within the proscriptions of the section (Section 2(a))" (R. 541, 542).

2. Delayed Bookings and Deliveries

The Facts

In the case of price advances, it has been petitioners' practice to accept orders for glucose at the old or lower prices for a period of usually five and occasionally ten days after announcement of price increases (R. 203). To receive the benefit of the old price, the purchaser must ordinarily call for or take delivery of the glucose thus ordered within thirty days from the date of the advance (R. 205). In certain instances, however, petitioners (a) have allowed customers to book at the old prices after the expiration of more than five days from the announcement of price increases (R. 219-220, 227), and (b) have extended the time within which withdrawals could be made by customers against orders so as to permit deliveries to

be made to customers at the old prices more than thirty days after the announcement of price changes (R. 221).

There was no evidence whatever and no stipulation as to any effect of these occurrences upon competition with or the competitive ability of either petitioners or their customers.

The Commission's Decision

The Commission found that in these instances there was price discrimination in violation of Section 2(a).

Although, as stated, there was no evidence and no stipulation as to the effect of the transactions upon competition, the Commission (R. 473-74) attempted to escape this defect by treating the stipulation in regard to Basing Point Prices (R. 198-99), as though it were applicable to these instances which, clearly, it was not.

Moreover, the Commission failed to find, as requested by petitioners, that any prima facie claim of discrimination was rebutted by the uncontradicted testimony of witnesses called by the Commission, that what was done in these instances was "to meet a competitive situation which was brought upon us" (R. 220) or "because some competitor has offered them (the customers) the same proposition" (R. 227) and that when the extensions were not granted petitioners suffered a loss of business (R. 221).

The Decision of the Court Below

The Circuit Court of Appeals upheld the Commission's decision on these points and directed enforcement of this phase of its order. It failed to discuss, except possibly by inference, petitioners' contention that extensions of the periods allowed for booking orders or withdrawals were matters of terms and conditions rather than of prices. Despite the complete absence of any proof or stipulation with respect to the effect of the alleged discrimination on competition, Judge Lindley said:

> "The Commission was amply justified in finding the practices reasonably likely to diminish the buying

ability of those paying higher prices as compared with competitors paying the lower prices." (R. 534)

This indicates that the lower court considered that the alleged discrimination was unlawful because of its effect upon the competitive ability of petitioners' customers. However, the statute by its terms is violated only when the effect of alleged discrimination is to prevent competition with a customer who "knowingly receives the benefit of such discrimination". The court's decision that the discrimination came within the prohibition of the statute was therefore in conflict with its own correct finding that "no customer knows how another is being treated" (R. 533).

3. Sales of Tank Car Quantities to Tank Wagon Customers

These transactions were treated by the Circuit Court of Appeals in its opinion along with delayed bookings and deliveries under the general heading "Discriminations from Booking Practices". However, they involve quite different facts.

The Facts

At various times petitioners have booked orders for and have sold tank car quantities to customers in the Chicago area who ordinarily purchase only in small tank wagon quantities and have no facilities for unloading tank cars. Deliveries of the quantities sold have been made to these customers by tank wagons from petitioners' storage facilities in Chicago. Petitioners' prices for tank wagon deliveries are higher than their prices for syrup delivered in tank cars to compensate for the additional cost of the tank wagon service, and in all the instances involved the customers have been charged and have paid the higher tank wagon prices (R. 254-255, 285-288).

At each time when these transactions occurred, the privilege of purchasing in tank car quantities was offered and made available to every tank wagon buyer (R. 328,

365). Indeed, at that time the tank wagon buyers argued that they were being discriminated against in favor of those who could buy in tank cars (R. 256).

Moreover, it was testified definitely and without contradiction by witnesses for both the Commission and petitioners that when petitioners sold tank car quantities to these buyers ordinarily purchasing in tank wagon lots, they did so to meet the competition of other companies competing with petitioners (R. 256, 324, 348).

There was no proof or stipulation that these transactions had or might have any effect whatever upon competition with or the competitive ability of petitioners or of their customers.

The Decision of the Commission

The Commission found that price discrimination in violation of Section 2(a) had been established. It did not clearly indicate in whose favor and against whom the supposed discrimination occurred. Although the uncontradicted evidence showed that the privilege of buying in tank car quantities was made available to all tank wagon customers, it appeared to consider that there was discrimination against certain tank wagon customers and in favor of others. It did not suggest that there was price discrimination in favor of the tank wagon customers and against the tank car buyers and it could not have done so since the former were charged the higher tank wagon prices (R. 472, 473).

With regard to the effect of the alleged price discrimination upon competition, the Commission, in the complete absence of any evidence or stipulation on this point with respect to these transactions, again treated the stipulation entered into with regard to basing point prices as though it were applicable to these transactions (R. 473, 474), which it clearly was not.

Despite the very specific evidence that petitioners' actions were taken to meet similar practices of its competitors, the Commission made no finding whatever on this point.

The Decision of the Court Below

The Circuit Court of Appeals upheld the Commission's decision. What has been said concerning the court's action with regard to the previous subject is equally applicable here. Furthermore, the court dismissed the uncontradicted showing that the sales in question were made to meet similar sales of competitors with the comment that the testimony "was general in character and vague in effect" and that "there was no testimony as to specific instances or facts" (R. 534). These statements were incorrect since as to these particular sales there was definite testimony regarding "specific instances" (R. 329).

4. Allowances and Discounts

The Facts

As a by-product of their corn refining, petitioners produce large amounts of gluten feed and meal which they sell and ship to approximately 3,000 different purchasers located in different states. Such feed and meal compete with similar products produced and sold by petitioners' competitors in the corn refining industry and with other types of feed produced by distillers, cotton-seed mills, wheat flower mills, and soya bean crushers. Under contracts or oral arrangements with certain purchasers who buy these products in very large quantities, petitioners have granted to them discounts or allowances below petitioners' quoted market prices amounting to 50 cents and, in some cases, 65 cents per ton (R. 108, 114, 117).

No testimony was offered as to the effect, if any, of these allowances upon competition. All that the record contains on this point is a stipulation entered into by the parties (R. 186-191). It was stipulated that the dealers to whom the allowances were granted were in competition both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed, with other dealers to whom petitioners also sold, and that the allowances would be sufficient "*if and when*" reflected

in whole or in substantial part in resale prices to attract business to the customers receiving them and away from their competitors or to force such competitors to resell feed and meal products at a substantially reduced profit or to refrain from reselling. It was not stipulated, however, and there was no proof that the allowances ever were reflected by the customers in their prices, or ever had these effects.

It was also stipulated that in the period since June 19, 1936, petitioners sold substantial quantities of certain brands of starch to Keever Starch Company and Stein-Hall Company and that commissions or allowances from petitioners' prices were made to these concerns, while at the same time substantial quantities of these same commodities were sold at current market prices without allowances to other concerns competitively engaged with Keever and Stein-Hall. It was similarly stipulated that the allowances granted by petitioners to Keever and Stein-Hall were sufficient *"if and when"* reflected in whole or in substantial part in retail prices to attract business to them and away from their competitors or to force such competitors to resell such products at substantially reduced profit or to refrain from reselling. Here, again, there was no proof that the discounts ever were so reflected or ever had the results described (R. 191-193).

The Decision of the Commission

The Commission, quoting the stipulations but without any finding that the allowances or discounts ever were reflected in the sales prices of petitioners' customers or ever affected competition, found that the giving of these allowances constituted price discrimination within the prohibition of Section 2(a) (R. 474-481).

The Decision of the Court Below

The Circuit Court of Appeals upheld the Commission's decision and order.

Judge LINDLEY, in his opinion, erroneously said (R. 535) that "petitioners assert that the necessary adverse effect

upon competition must be an actuality rather than a reasonable probability". Instead, petitioners urged, exactly as Judge LINDLEY suggests, that the evidence must establish a "reasonable probability" that the allowances or discounts would have the effect on competition specified in the statute. But they argued, further, that there was no basis for assuming the existence of such a reasonable possibility unless it was shown that the discounts actually were reflected in lower prices quoted by the recipient for their products, a fact which if it had existed would have been readily susceptible of proof.

B. Alleged Violation of Section 2(e)

Section 2(e) as amended by the Robinson-Patman Act provides:

> "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The Facts

Prior to 1936, dextrose (refined corn sugar) although known to physicians and technical experts, was a new product to the housewife, the baker and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80 per cent of their sales were to the baking industry. Petitioners desired to expand the field of dextrose and stimulate its use by other industries (R. 175). The manufacturing processes of candy makers had been developed on the basis of using ingredients other than dextrose and a great deal of research would be required before they could change their formulæ to include the use of dextrose (R. 175). In these circumstances, the officials of petitioners conceived the idea of finding a candy manufacturer, selling and advertising

on a national scale, who could be persuaded to use dextrose and then to publicize, through his advertising and sales media, the use of dextrose as an ingredient in his candies. Two preliminary experiments in this direction were made in a small way with the Bachman Chocolate Manufacturing Company of Mt. Joy, Pa. and with the Lewis Candy Company in New England, but these did not prove successful because these companies did not have adequate distribution (R. 61, 62, 180, 181). Then petitioners approached the Mars Candy Company on the proposition, but it was unwilling to undertake the experiment (R. 62). In 1935 or 1936, petitioners entered into negotiations with the Curtiss Candy Company for the purpose of inducing that company to use dry dextrose in its candies and to advertise them as containing dextrose. Curtiss had as wide a distribution of its candies as any candy manufacturer in the United States, was as aggressive as any other company in the business, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301). Before Curtiss would enter into any arrangement it experimented for approximately a year with the help of petitioners to ascertain whether dextrose could be used satisfactorily in its candies (R. 175). In September 1936, Curtiss and petitioners reached an understanding for the arrangement here involved. The substance and essential features of the arrangement were as follows:

(1) The arrangement was not a part of any contract or agreement by Curtiss to purchase dextrose or corn syrup from petitioners and contained no condition requiring such purchase. Curtiss did agree to use in its candies a sufficient quantity of dextrose so that the candies might legitimately be advertised as "rich in dextrose" but Curtiss was left free to purchase dextrose from any suppliers and there were other companies than petitioners which produced and sold dextrose (R. 296, 297, 318).

(2) Curtiss agreed to show the words "rich in dextrose" on all of its wrappers and other containers,

in its display advertising and upon the uniforms of its peddlers. This was done by Curtiss at very substantial expense to it (R. 174, 179, 302, 303, 317).

(3) Curtiss agreed to and did place its national radio and magazine advertising through petitioners' advertising agency, and advertisements were worked up in which Curtiss advertised their candies as "rich in dextrose" while petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 59, 178, 297, 299).

(4) Petitioners paid no money in any way to Curtiss. Each party paid the advertising agency for the radio and magazine advertisements placed for it by the agency. Petitioners' expenditures for their own advertising of their dextrose under the arrangement amounted to $100,000 in 1936, $250,000 in 1937, and $200,000 in 1938 and 1939 respectively (R. 297). The total advertising expenditures of Curtiss for advertising its candies stood in the ratio of at least two to one to those of petitioners (R. 177). However, neither party was under any obligation to spend any definite amount or any amount at all for its advertising (R. 61, 318).

Although not obligated by the arrangement to purchase any dextrose from petitioners, Curtiss, since the arrangement was entered into, had increased its purchases of both corn syrup and dry dextrose from petitioners (R. 291, 292). This was not pursuant to any understanding relating to the advertising arrangement (R. 293, 294).

The Curtiss Candy Company is engaged in the manufacture and sale of candies (R. 292). It is not engaged in the sale of dextrose. The dextrose and corn syrup which it purchased from petitioners were purchased by it for use as ingredients in its candies and not for resale by it as dextrose or corn syrup (R. 293).

Petitioners have offered an arrangement similar to that with Curtiss Candy to others, and petitioners' vice-presi-

dent testified that petitioners are ready at any time to enter into similar arrangements on a proportional basis with any other candy manufacturer who is willing to use sufficient dextrose in his candy to advertise it as "rich in dextrose", is willing to advertise the dextrose content as a feature of his candies, changing his wrappers and other advertising media for the purpose and whose distribution and national advertising are substantial (R. 179-180).

The Decision of the Commission

The Commission found that this arrangement constituted a violation of Section 2(e) and ordered petitioners to cease and desist therefrom. It found that petitioners had not entered into a similar arrangement with any candy manufacturer competing with Curtiss, but it did not find, as it could not since there was no such proof, that petitioners had ever refused to do so or that there was any other candy manufacturer who desired or even was willing to enter into a similar arrangement. It did not mention or discuss the question raised by petitioners whether dextrose bought by Curtiss to be used as an ingredient in its candies was "a commodity bought for resale, with or without processing" (R. 481-485).

The Decision of the Court Below

The Circuit Court of Appeals upheld the Commission's decision and directed obedience to its order with regard to the Curtiss transaction. The court rejected petitioners' contention that since the arrangement involved no obligation on the part of Curtiss to purchase dextrose from petitioners, it was not entered into with Curtiss as a "purchaser". With regard to the contention that the dextrose purchased by Curtiss and used by it as an ingredient in the manufacture of candy was not "a commodity bought for resale, with or without processing", the court remarked that "processing is a relative term. * * * It is an act

or a series of acts with regard to the subject matter in its transformation into a different state or a different thing". It said that although dextrose may constitute only 5 per cent of "the product when it emerges in candy, and is not capable of being isolated thereafter by chemical reduction", nevertheless "Congress employed the words 'with or without processing' as an all-comprehensive term" and it held that the dextrose was purchased by Curtiss for resale "with * * * processing" (R. 538). The other contentions urged by petitioners which will be discussed hereafter were likewise rejected by the lower court.

Specification of the Assigned Errors Intended to be Urged

With regard to the several issues involved, petitioners will urge that the Circuit Court of Appeals erred in the following respects:

1. In its decision regarding Basing Point Prices, the Circuit Court of Appeals erred:

(a) In holding that differences in delivered prices at different destinations resulting from the basing point method constitute discrimination in price within the language of Section 2(a);

(b) In disregarding both the language and the legislative history of the Robinson-Patman amendment to Section 2(a) which make it clear that the Congress did not intend thereby to prohibit differences in delivered prices at different destinations resulting from the basing point method;

(c) In failing to hold that where contracts are made for delivery 30 days thereafter, where petitioners have two plants and do not know in advance from which plant shipment may be made, no discrimination in price results from contracting for a delivered price, the freight factor of which may later prove to be different from the actual freight.

(d) In failing to find that much more serious discrimination between customers at the same destination would result from charging them different prices dependent upon the plant from which shipment should happen to be made.

(e) In holding that the stipulated facts warranted a finding of reasonable probability that the charging of "Chicago plus" delivered prices would, where deliveries are made from the Kansas City plant, have the effect upon competition described in Section 2(a) and essential to a finding of a violation thereof.

(f) In failing to hold that there was no evidence and no finding that any customer "knowingly" received the benefit of the alleged discrimination and that therefore no finding of a violation of Section 2(a) could properly be made based upon the supposed effect of the alleged discrimination upon competition between petitioners' customers.

(g) In failing to set aside the decision and order of the Commission as contrary to law and arbitrary, and in directing compliance with that order.

2. In its decision regarding Delayed Bookings and Deliveries, the Circuit Court of Appeals erred:

(a) In holding that extensions of time for booking orders or for taking delivery were matters of price rather than of "terms" and came within the application of Section 2(a).

(b) In upholding the Commission's finding, in the absence of any evidence, that the effect of these practices upon competition was such as to make them unlawful under Section 2(a), and in accepting the Commission's erroneous reliance upon a stipulation entered into solely with regard to basing point prices as though it were also applicable to this phase of the case.

(c) In failing to rule that the Commission's decision and order were abitrary and that it erred in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by their competitors; and

(d) In affirming the decision of the Commission upon these matters and directing compliance with its order.

3. In its decision regarding sales to tank-wagon customers, the Circuit Court of Appeals erred:

(a) In holding that there was discrimination in price in spite of the fact that these tank wagon buyers paid the tank wagon prices and in spite of the fact that the privilege was offered to all tank wagon buyers.

(b) In affirming the Commission's finding of a violation of Section 2(a) in the complete absence of proof or stipulation as to the effect of the practice on competition and in accepting the Commission's erroneous reliance upon the stipulation regarding basing point prices.

(c) In failing to rule that the Commission was arbitrary and erred in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by their competitors; and

(d) In affirming and directing compliance with the order of the Commission upon these matters.

4. In its decision regarding discounts or allowances accorded by petitioners to certain customers, the Circuit Court of Appeals erred:

(a) In affirming the decision and order of the Commission and in failing to hold that in view of the complete lack of proof or stipulation that the discounts or allowances were ever reflected by the customers receiv-

ing them in lower prices for their products, the Commission erred in finding violations of Section 2(a).

(b) In directing compliance with the Commission's order.

5. In its decision regarding the cooperative arrangement with the Curtiss Candy Company for advertising, the Circuit Court of Appeals erred:

(a) In holding that the dextrose purchased by Curtiss for and used by it only as an ingredient in its candies, in which it completely lost its identity, was a "commodity bought for resale with or without processing" within the meaning of Section 2(e).

(b) In failing to hold that since it was no part of the arrangement with Curtiss that it should purchase dextrose from petitioners, the transaction was not with Curtiss as a "purchaser" and therefore was not subject to Section 2(e).

(c) In holding that petitioners had not accorded similar arrangements to other customers, in the face of uncontradicted testimony that petitioners were willing to make similar arrangements with other candy manufacturers with similar nation-wide advertising and methods of distribution and in the absence of any proof that there was any candy manufacturer who wanted to enter into a similar arrangement and had been refused by petitioners and that there was any other candy manufacturer who had similar advertising.

(d) In holding that the arrangement involved the furnishing to Curtiss of a service or facility within the meaning of Section 2(e), and in failing to find that by the arrangement petitioners were procuring advertising for their own product, dextrose.

(e) In affirming the order of the Commission with respect to this transaction and directing compliance therewith.

Summary of Argument

Argument with Reference to the Alleged Violations of Section 2(a) of the Clayton Act

Point I. Petitioners' practice of determining delivered prices by the "Basing Point" method and the differences in prices at different destinations resulting therefrom did not violate Section 2(a).

A. The basing point method of determining delivered prices was in general use long before the Robinson-Patman amendment of Section 2 of the Clayton Act. Therefore, a decision that such prices became unlawful under the Robinson-Patman Act can be justified only if the language of that Act and its legislative history clearly indicate an intention by Congress to prohibit them.

B. Neither the language nor the history of the Robinson-Patman Act permits the conclusion that it was the intention of Congress thereby to prohibit basing point prices.

1. Section 2(a), as amended by the Robinson-Patman Act, does not by any clear language prohibit differences in prices at different destinations resulting from the basing point method. Indeed, in so far as concerns basing point prices, the amendment made no material change in the language of the statute under which such prices had not been regarded as unlawful.

2. That Congress in enacting the Robinson-Patman Amendment considered that basing point prices were not previously unlawful under old Section 2 of the Clayton Act is indicated by the inclusion in the original draft of the amendment of a clause which would have specifically prohibited them, while the intention of Congress that basing point prices should not be made unlawful is conclusively demonstrated by the fact that this clause was stricken from the amendment before it was adopted. This intention is also shown by the discussions in Congress clearly indicating that the passage of the amendment was secured upon the assurance that it did not outlaw basing point prices.

C. Even if differences in prices resulting from the basing point method may constitute discrimination in violation of Section 2(a), the record here does not support a finding of such violation.

1. Discrimination exists only when there is injury to one and benefit to another which will be eliminated by the removal of the cause claimed to be discriminatory. Petitioners, with plants at both Chicago and Kansas City, cannot be found to discriminate by selling at a delivered price made up of a Chicago base price plus freight from there, since by shipping from Chicago rather than from Kansas City they would remove what the Commission claims to be price discrimination and yet the purchaser would pay the same price as is complained of.

2. Section 2(a) is not violated by sales at basing point prices unless the effect may be substantially to lessen competition or create a monopoly or to injure, destroy or prevent competition with a purchaser knowingly receiving the benefit of discrimination. The words "may be" indicate a substantial probability rather than a mere theoretical possibility. *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, and other cases. There is no evidence that sales at basing point prices will tend to create a monopoly in petitioners. With regard to the effect on competition between purchasers from petitioners, there can be no substantial competition unless substantial competition already exists. *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291. The only facts in the record with regard to the effect on competition with purchasers from petitioners are the facts stated in a stipulation. This stipulation does not support a finding of probable substantial lessening of competition or injury to the ability of petitioners' customers to compete. The Commission, in finding a violation, went outside the stipulation and drew inferences therefrom. This was improper. *Koppel* v. *Massachusetts Brick Co.*, 192 Mass. 223; *Lumbermen's Trust Co.* v. *Town of Ryegate*, 61 F. (2d) 14, 17. There is no violation of Section 2(a) unless a customer *knowingly* receives the benefit of the alleged discrimina-

tion, and there is no proof here that any purchaser had knowledge.

3. The Commission and the court below failed to interpret and apply Section 2(a) in the light of the practical situation resulting from the fact that petitioners have two plants, one at Chicago and one at Kansas City; that contracts are made for delivery thirty days thereafter; that when the price is contracted for it is not known from what plant shipment will be made since this is within the discretion of petitioners, depending on conditions at the plants; and that different prices to purchasers at the same destination would result if petitioners were required to charge prices including only actual freight rates, which would be more serious price discrimination than the charging of different prices to purchasers at different destinations.

Point II. Petitioners did not violate Section 2(a) in certain instances where they allowed customers more than the usual periods for booking orders or calling for deliveries.

The extensions of time for booking orders or calling for deliveries were matters of terms and not of price and therefore did not come within Section 2(a). The Commission and the court below erred in failing to find that in these instances petitioners were meeting competition. There was no evidence whatever as to the effect of these transactions upon competition.

Point III. Petitioners did not violate Section 2(a) in selling in tank car quantities to tank wagon customers.

There was no price discrimination since these customers paid tank wagon prices and the privilege was offered to all tank wagon customers. There was no evidence of the effect of the practice upon competition.

Argument with Reference to Count II of the Amended Complaint Alleging Violations of Section 2(e) of the Clayton Act

Point I. The arrangement with Curtiss Candy Company was not made with it as a purchaser from petitioners.

Section 2(e) relates only to discrimination between purchasers. The cooperative advertising arrangement did not obligate Curtiss to purchase dextrose from petitioners and was not made with it as a purchaser.

POINT II. There is not here involved any commodity bought for resale with or without processing.

Section 2(e) relates only to transactions involving commodities "bought for resale with or without processing". Curtiss buys dextrose only for use as an ingredient in its candies along with various other ingredients. Therefore any dextrose purchased by it was not purchased for resale "with or without processing".

POINT III. There is no proof of discrimination between purchasers of dextrose for resale.

There is no proof that any of the competitors of Curtiss purchased dextrose for use in candies competitive with those of Curtiss and there is no proof that they desired to enter into a similar advertising arrangement with petitioners or that petitioners refused.

POINT IV. Petitioners did not furnish or contribute to the furnishing of any facilities connected with the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

The advertising arrangement was one whereby petitioners procured advertising advantages from Curtiss.

POINT V. There was no failure to accord the same arrangement to other purchasers from petitioners on substantially equal terms.

The fact that petitioners did not enter into similar arrangements with others did not establish such a failure in the absence of proof that there were other purchasers who desired to enter into such an arrangement and were refused.

POINT VI. The Commission had no jurisdiction here because the dextrose purchased by Curtiss was not sold by petitioners in interstate commerce.

ARGUMENT WITH REFERENCE TO THE ALLEGED VIOLATIONS OF SECTION 2(a) OF THE CLAYTON ACT.

Preliminary discussion of Section 2(a).

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, enacted June 19, 1936, provides in part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *."

There follows a proviso:

> "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

It will be seen from the foregoing that the first essential of a violation of Section 2(a) by a seller is *discrimination in price* between purchasers of commodities of like grade or quality where interstate commerce is involved. The Act does not define what was intended by the word "discriminate" nor does it define "price". Presumably, discrimination involves difference, but does it mean each and every difference in price; does it mean differences in prices charged to buyers at different destinations, and if so, what

measures the differences that are prohibited? Moreover, discrimination involves more than difference in prices; there can be discrimination between purchasers only when they stand in a competitive relationship to each other, and the difference in treatment is the source of substantial benefit to one and substantial injury to the other.

But a showing of discrimination is not alone sufficient to establish a violation of Section 2(a). It must also be proved that the discrimination has one of the specific effects on competition described in the clauses quoted in the first paragraph.

Here it will be noted that a mere possibility of a minor lessening of competition or a small tendency to create a monopoly is not sufficient to establish a violation of Section 2(a). The lessening of competition and the tendency to monopoly must be *substantial*. What the words "may be" mean is open to argument and will be discussed further hereafter. But it seems clear, as we will contend, that they must indicate something more than a vague, hypothetical or theoretical possibility and must be construed to connote existence of a reasonable probability that the alleged discrimination will have the effects upon competition specified in the statute. Hence, even if there be discrimination in price there would seem not to be a violation of Section 2(a) unless the facts show a reasonable probability that the discrimination will *substantially* lessen competition or tend to create a monopoly.

It must be borne in mind that the Clayton Act is a statute designed to prevent monopoly and the elimination of competition. It is not an anti-discrimination statute, except as discrimination may bring about the consequences at which the statute is directed.

Moreover, since the Commission's findings make it clear that it was the supposed effect of the alleged price discrimination upon competition between petitioners' customers with which the Commission was chiefly concerned, it is important to note that by the terms of Section 2(a) knowledge on the part of a buyer that he is receiving the benefit of the discrimination is essential to the existence of a violation.

Paragraph (b) of Section 2 states that when at any hearing proof has been made "that there has been discrimination in price or services or facilities furnished"

> "nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

POINT I

Petitioners' practice of determining delivered prices by the "Basing Point" method and the differences in prices at different destinations resulting therefrom did not violate Section 2(a).

The facts pertinent to this issue are stated at pages 5 to 8 of this brief.

A. THE "BASING POINT" METHOD OF DETERMINING DELIVERED PRICES WHICH PETITIONERS EMPLOYED HAS BEEN IN SUCH LONG AND GENERAL USE IN COMMERCE THAT DIFFERENCES IN PRICES RESULTING THEREFROM SHOULD NOT NOW BE HELD UNLAWFUL UNLESS PROHIBITED BY LANGUAGE SO CLEAR AND DEFINITE AS TO INDICATE BEYOND QUESTION AN INTENTION OF THE PART OF CONGRESS TO ABOLISH BASING POINT PRICING.

Petitioners' pricing method, which produced the price differences alleged to violate Section 2(a), is what economists, legislators and business men have generally referred to as the "basing point" method or practice of arriving at delivered prices.

Eugene W. Burr, an attorney for the Federal Trade Commission, testified on March 6, 1939 before the Temporary National Economic Committee (Verbatim Record, Vol. 2, No. 14, pp. 306-307):

"* * * A basing point system is one under which there are certain points of production and sometimes certain points that are not points of production, as is true in steel, that are selected as basing points, and the industry charges at any given point of destination, any location of the customer, a price which is made up of the basing point price plus the freight from that point to customer's location, and defrays the actual cost of delivery itself, the producer paying the actual cost where that actual cost of delivery differs from the freight charged from the basing point."

Professor Frank S. Fetter, of Princeton University, testifying before the Temporary National Economic Committee on March 7, 1939, gave the following definition (Verbatim Record, Vol. 2, No. 15, p. 340):

" 'This basing point practice is quoting and selling in certain territory' (that is to cover the control area) 'homogeneous products by a formula of delivered prices identical with that of another mill or mills made up of the base price of another mill than the one selling,' I think that is really the crux of it—the formula is based upon another mill than the one selling, 'plus freight from that mill', not from the mill selling."

Walter S. Tower, Executive Secretary of the American Iron and Steel Institute, testified before the Committee on Interstate Commerce of the United States Senate, Seventy-fourth Congress, Second Session, at the hearings on S. 4055, on March 18, 1936 (at p. 273 of the record of such hearings):

"Under the basing-point method the seller quotes a 'delivered' price to the buyer. The 'delivered' price is composed of the price at the basing-point—which may or may not be the location of the seller's plant—plus freight charges from the basing point to the point of delivery."

See, also, the record in *In the Matter of United States Steel Corporation*, Federal Trade Commission Docket No. 760, commonly known as the *Pittsburgh-Plus Case*, 8 F. T. C. 1.

The basing point method of pricing is and long has been in common use in many industries throughout the United States. During the period while the N. R. A. was in effect, the codes provided for basing points in the following industries: cast iron pipes, iron and steel, refractories, re-enforcing materials and lime. Under the Guffey Coal Act, bituminous coal was sold pursuant to Government regulation at prices which were arrived at by the basing point method (Record of Hearings on S. 4055). And then we have the famous Pittsburgh plus basis on which the steel industry sold its products. Following the Commission's decision cited above, the single basing point pricing method in the steel industry gave way to a multiple basing point practice—but the basing point feature still persisted. *Report to the President with respect to the Basing-Point System in the Iron and Steel Industry.*

At the present time the basing point method of pricing is recognized in price ceilings and orders of the Office of Price Administration, not only in heavy industries, but also in industries dealing in other commodities such as poultry (Maximum Price Regulation No. 269, C. F. R. Title 32, Ch. 11, Part 1429, Fed. Register, November 10, 1942).

In at least two cases before the Supreme Court prior to the passage of the Robinson-Patman Act there were before this Court the sales practices of industries employing the basing point method, *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 (1925). These cases involved charges of violations of the anti-trust laws and of monopolistic activities. It is significant that in neither case, despite the wide scope of the allegations, was the basing point method of determining delivered prices attacked, nor did the Court give any indication that it considered this pricing practice unlawful. Indeed in the *Cement* case, the Court discoursed on the benefits of this pricing method in avoiding monopoly and preserving and promoting competition. See also 45 Harvard Law Review 548, "*The Legality of Basing Point Systems.*"

Such being the situation, it is clear that differences in delivered prices at different destinations resulting from the basing point system may not properly be found to constitute unlawful price discrimination in violation of Section 2(a) unless the language of its provisions and the circumstances of its enactment plainly indicate that Congress intended thereby to reach and condemn the basing point method of determining delivered prices of goods sold in interstate commerce.

B. Neither the language nor the legislative history of the Robinson-Patman Act permits the conclusion that it was the intention of Congress by enacting it to prohibit the basing point method of determining delivered prices. A seller whose differences in delivered prices at different destinations are the result of the use of the basing point method does not "discriminate in price between different purchasers" within the language or intent of Section 2(a).

1. *The Language of Section 2(a)*

It is not charged here that petitioners discriminate in prices between buyers in the same markets. It is undisputed, for the purposes of this point, that on a given date petitioners' price is the same to all buyers at the same destination. The complaint involves the charging of different prices at different destinations and the claim is that the differences in price are improper under the circumstances of shipment. The first question, therefore, is whether the Robinson-Patman Act had the effect of prohibiting differences in price to buyers at different points.

Where two buyers located in the same city are engaged in business under the same conditions and are in competition with each other, there may reasonably be a presumption of discrimination between them if a seller charges one a different delivered price from that charged the other for goods of the same quality, shipped in the same manner and quantity. Therefore, there is no difficulty

in concluding that by making it unlawful for a seller "to discriminate in price", Congress intended to prohibit such discrimination between buyers in the same locality. But it by no means follows that the language of Section 2(a) should be construed as prohibiting differences in prices charged to buyers at different localities. Such a prohibition would involve one of two assumptions: either that all buyers everywhere must pay the same delivered price, just as one pays a quarter for a tube of toothpaste whether it be at a drugstore in Chicago or at one in San Francisco; or else that the differences in prices charged to buyers at two different destinations must conform to some particular measure or standard.

Certainly Section 2(a) neither expressly declares that the discrimination in price which it prohibits shall include differences in prices charged to buyers at different destinations nor specifies the standards by which the measure of proper and non-discriminatory price differences can be determined, except as such standards may be inferred from the vague and indefinite language of the first proviso. But it is apparent from this language that it has reference to differences in cost of delivery due to differences in method of shipment and in quantities—as for example carloads compared with less than carload quantities.

Furthermore, an indication that Section 2(a) was not intended to embrace within its prohibition differences in prices between buyers at different localities is found in Section 3 of the Robinson-Patman Act, which provides, in part, that it shall be unlawful

> "to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted * * * elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; * * *."

This language, which is expressly aimed at discrimination between buyers in different localities, would appear superfluous if such discrimination were already prohibited by Section 2(a) of the Clayton Act as amended. Moreover,

we find Representative Utterback, Chairman of the Sub-Committee of the House Committee on the Judiciary, during the debate in the House upon the bill which later became the Act, saying (80 Congressional Record, p. 9416):

> "* * * where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination * * *."

But if it be conceded, for the sake of argument, that certain differences between prices charged to buyers at different destinations were aimed at by the words "discriminate in price" in Section 2(a), we search in vain for any indication as to the measure of the differences in delivered prices which were intended to be prohibited.

Had Congress intended that the differences between the transportation charges actually paid by a seller on shipments to several buyers at their respective destinations must measure the differences in the delivered prices charged to them, it could easily have so provided. Indeed, as we will see, a bill to this effect was proposed and rejected. Instead the only guide which is embodied in Section 2(a) is the vague language of the first proviso, "differentials which make only due allowance for differences in the cost of * * * delivery." The term "due allowance" indicates a degree of flexibility but its limits are not defined. Moreover, it seems from the language that even this proviso, which is the only suggestion of a standard, is not applicable at all in the case of an article delivered to different destinations by the same method and in the same quantity.

To support the conclusion of the Commission and of the court below, it would be necessary, therefore, to resort to interpretation to give to the language used something more than its ordinary meaning. Accordingly, it is pertinent to examine the history of the legislation and the discussions in Congress for the purpose of ascertaining whether such construction of the words employed would

conform to the Congressional intent and, if not, what the purpose of Congress was.

A review of the history of the legislation and of the debates in Congress on the bills which became the Robinson-Patman Act and which amended Section 2(a) to read as it now does makes it amply clear that to interpret the words of Section 2(a) as prohibiting differences in prices resulting from the basing point method would be contrary to the intention of Congress. Such a review indicates, indeed, that when Congress passed the Robinson-Patman Act, it regarded the basing point practice as lawful and that its definite purpose was to exclude from that Act and from the Clayton Act, as amended thereby, any prohibition against or provision which would impair the use of the basing point practice in commerce.

2. *Legislative History*

Selling at delivered prices determined by the basing point method has not been an obscure and unknown practice which suddenly came to light in 1936. Many industries for many years have employed this practice. Its economic virtues and vices have been discussed in numerous articles, pamphlets and books.* In 1924, the Federal Trade Commission published its famous report in the *Pittsburgh Plus* case, 8 F. T. C. 1, wherein it argued that basing point prices were economically unsound and should be outlawed and expressed its own view that they violated Section 2 of the Clayton Act, as it then was. From that time onward the Commission has crusaded against basing point prices.

It is of great significance, therefore, that until the two cases now before this Court, the *Staley* case (No. 559) and this, no court has held that sales at basing point prices were unlawful. The Commission did not attempt to enforce its views in the *Pittsburgh Plus* case, in the courts and in the twelve years which elapsed until the Robinson-Patman Act was passed in 1936, no court ruled nor, so far as we can discover, was asked to rule that sales at basing point prices

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* A partial bibliography is included herein as Appendix B.

constituted unlawful discrimination within the prohibition of Section 2 of the Clayton Act, or were in themselves unlawful under any other statute. Indeed, during this period, this Court considered the two cases previously cited, *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563, *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, in which the basing point pricing method was present, without suggesting that it was illegal.*

Judge LINDLEY in his opinion (R. 530) cites the decision of the lower court in *U. S.* v. *Sugar Institute*, 15 F. Supp. 817, as condemning and enjoining defendants from selling "only on delivered prices * * * including zone prices." He says that upon appeal "defendants waived their assignments of error as to each of these," and that "Thus defendants were finally enjoined from selling at prices including artificial or fictional items of freight." But examination of Judge MACK's opinion in that case (pp. 845-856) and this Court's opinion, 297 U. S. 553, at pages 590 and 591, will show that it was the concerted action of the defendants in selling at delivered prices that was condemned and that there was no contention and no decision that it was in any way unlawful for an individual concern by itself to sell only at delivered prices, and no suggestion was made that these delivered prices must include only actual freight.

Despite its early report in the *Pittsburgh Plus* proceeding there is every reason to conclude that the Commission itself did not consider that basing point prices were unlawful under the Clayton Act as it was originally. It certainly did not give Congress cause to believe that it regarded basing point prices as in and of themselves prohibited by the old Section 2. For while it urged the economic objections, as it saw them, to basing point prices, it indicated its view that action could be taken against basing

* See in this connection 50 Harvard Law Review, 106, 107 in which the Editors express the view that the basing point system which "was considered legal under § 2 of the Clayton Act" before its amendment by the Robinson-Patman Act was not outlawed by the latter in its final form.

point prices only where there was a violation of the anti-trust laws and it stressed the desirability of new legislation which would make this unnecessary by outlawing basing point prices directly.

Thus in 1934 in its *Report to the President with respect to the Basing Point System in the Iron and Steel Industry*, at page 41, the Commission asked that the executive sanction of the basing point system which had been given under N. R. A. be eliminated so as to leave the system "open to attack on the ground that it violates the anti-trust laws", and make it possible "to go forward in formal proceeding to test the basing-point system under the Sherman Act or the Federal Trade Commission Act" (no mention of the Clayton Act). And in its *Report to the President on Prices of Sheet Steel Piling* (1936) it said (p. 42):

> "Once Congress has created an anti-basing point bill, the immense expense of separate investigations and the laborious trial of separate suits would be avoided."

Consistently with this situation in the past, the complaint in this proceeding did not allege that petitioners' basing point prices were unlawful under Section 2 of the Clayton Act as it existed from 1914 to 1936. Instead the allegation of price discrimination was limited to the period beginning June 19, 1936, the date upon which the Robinson-Patman Act became effective, and it was alleged that petitioners had violated Section 2(a) of the Clayton Act, as amended thereby. Throughout the hearings counsel for the Commission made it clear that petitioners' pricing practices were not challenged as unlawful prior to June 19, 1936.*

Therefore it is pertinent to examine the Robinson-Patman Act to discover whether its terms indicate a change in the law whereby differences in prices resulting from the

* See the allegations of the complaint, questions of Commission's counsel, stipulations, and the Commission's findings at the following pages of the record: 3, 9, 10, 22, 29, 30, 40, 49-51, 60, 64-66, 69, 77, 83, 85, 91, 107, 112, 155, 156, 162, 186-195, 203, 207, 241, 464, 475-80.

basing point method became prohibited. And it is appropriate also to discover whether Congress, in enacting the Robinson-Patman Act, either considered that basing point prices were unlawful under the old statute or intended to make them so by the amendment.

In the appendix herein we have set out Section 2 of the Clayton Act as it was prior to June 19, 1936, so that it may be compared with Section 2(a) as written into the law by the Robinson-Patman Act. From such a comparison it is impossible to see what new provisions could be claimed to have changed the law with respect to basing point prices so as to render them, or sales on the basis of such prices, thereafter unlawful.

Petitioners are charged with violating the provisions of Section 2(a) which makes it unlawful "to discriminate in price between different purchasers of commodities". But this language was in the old law. It is charged that petitioners' prices discriminate because the differences between prices at certain different destinations make more than "due allowance for differences in the cost of * * * delivery", as measured by the freight rates actually paid. But Section 2 in its original form contained similar and indeed more precise language, to wit, "due allowance for difference in the cost of transportation." There is reason to believe that the Robinson-Patman Act was directed chiefly toward certain practices in connection with chain stores,* and it amplified and added to the old law in such matters as quantity discounts. But none of the language in the Act as it was finally passed can by any stretch of the imagination be deemed relevant to basing point prices as such or to expand the words "to discriminate in price" so as to prohibit basing point prices when they were not previously prohibited by substantially the same words in the old law.

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* Its proposal followed the final report of the Federal Trade Commission on the Chain Store Investigation, Sen. Doc. No. 4, 74th Congress, 1st Session, page 96. See also "The Robinson-Patman Act, Its History and Probable Meaning", the Washington Post, 1936.

Counsel for the Commission in their brief in the Circuit Court of Appeals agreed with this view saying (p. 29):

> "if price discrimination through the use of the basing-point system was unlawful under the old Clayton Act, the amended Act did not make it lawful; if it was lawful under the old Act, the new Act did not make it unlawful."

Counsel for the Commission were there endeavoring to meet petitioners' argument based upon the legislative history but they incorrectly represented petitioners as arguing from the legislative history that by the Robinson-Patman Act Congress sought to legalize a pricing system which had been unlawful prior thereto.

Our argument, on the contrary, is that the legislative history makes it clear that Congress itself regarded basing point prices as legal under the old Clayton Act, and that, although there was a difference of opinion as to their economic merits, it was the definite intention of Congress that they should not be prohibited by the Robinson-Patman amendment.

What could be better proof of this fact than that there was stricken from the Robinson-Patman bill itself before its final enactment a provision which the bill originally contained which would have expressly prohibited selling on the basing point pricing system, and was intended to have this result.

The provision in question was subsection 5 of Section 2 of the Patman bill. Section 2 of this bill made it unlawful to discriminate in price and subsection 5 would have defined "price" to mean:

> "The amount received * * * after deducting actual freight or the cost of other transportation."

If this clause had remained in the bill it would have constituted a definite prohibition of the very thing which is the basis of the complaint here against these respondents; namely, selling at delivered prices which, after deduction

of the actual freight charges paid by the seller on each shipment, produced different net prices on sales to customers at the same or different points. This clause was directly aimed at the basing point method of price selling.

The Federal Trade Commission in its *Report to the President on Prices of Sheet Steel Piling,* referring to this bill and its companions which were then pending, said (p. 41):

> "Bills are now pending in both Houses of Congress that would make the operation of non-competitive basing point systems unlawful *per se.*"

Congressman Utterback, in the report of the House Committee on the Judiciary, Report No. 2287, to accompany H. R. 8442, referring to the definition of "price" provided by this subsection 5, said (p. 14):

> "In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities. It will require the use of the f. o. b. method of sale."

The inclusion in the bill of this subsection 5 expressly designed to prohibit basing point prices and the discussion of it in Congress are conclusive proof that the members of Congress regarded basing point prices as not unlawful under the Clayton Act in its old form. And there could be no more conclusive demonstration that Congress intended that the Robinson-Patman Act should not outlaw basing point prices than the fact that this subsection was eliminated from the bill before it was passed. Had it been the Congressional view that basing point prices were already prohibited by Section 2 as it previously existed, this clause to make them unlawful would not have been proposed. And had Congress desired by the Robinson-Patman Act to prohibit basing point prices, it would not have stricken out this clause which was designed to have and would have had this result. And the discussion of the bill and the

explanation given with regard to this elimination leave no doubt that this was done because the bill could not have been passed if it were to prohibit basing point prices.

This is shown by the following excerpts from the Congressional Record, Vol. 80 (Italics are added):

"Mr. Miller: * * * The next amendment that will be offered by the committee as a committee amendment will be directed at *subsection (5) on page 7, which is the basing point provision in the bill.*

Mr. Rich: Does the gentleman mean to strike out the whole section? (Italics added)

Mr. Miller: *That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill.* Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Congressional Record, p. 8106)

"Mr. Patman: * * * *Farmers' organizations* sent letters to all the Members saying they were opposed to certain things; I learned through their representatives in Washington 2 or 3 weeks ago they *were opposed to the basing-point provision of the bill, section 5.* So I took it up with the Judiciary Committee. *The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision.* This silenced a lot of the opposition. *The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut that out.*" (80 Congressional Record, p. 8113)

"Mr. Boileau: * * * *Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill.* I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. *The members of the steering committee believe that in order to insure its enact-*

ment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill." (80 Congressional Record, p. 8122)

"Mr. Robsion of Kentucky: * * * There were two features, however, on which we were not in full agreement. *Many of us opposed section 5,* on page 7, of this bill. *It is the so-called price-fixing or basing-point provision. It has been unanimously agreed that that section go out; * * *.*" (80 Congressional Record, p. 8130)

"Mr. Miller: * * * *The second amendment which the Committee on the Judiciary will offer* is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment *will be a motion to strike said lines 20 to 23,* both inclusive, therefrom.

"*This particular section* which the committee will seek to strike out *is designated as subsection* (5) on page 7, and *is what is commonly called the basing-point provision.*" (80 Congressional Record, pp. 8139, 8140)

The Congressional Record reports further and extended discussion of and vigorous opposition to any attempt to prohibit basing point prices. Among others, Congressman Citron explained to the House, as one of the reasons why it was advisable to eliminate this anti-basing point prohibition, that if it were enacted, it would compel the localization of operation of all manufacturers and wholesalers and that volume production with its resultant advantages would be seriously curtailed. (80 Congressional Record, pp. 8223-8224)

That it was regarded in the Senate when the bill was there considered that the prohibition against selling on delivered prices computed by the basing point method had

been eliminated and that the Robinson-Patman Act as passed would not prohibit the basing point method is indicated by the following colloquy which took place during the debate in the Senate:

"Mr. Davis. Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.

Mr. Borah. I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry.

Mr. Davis. *Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry.*

Mr. Borah. *My opinion would be that this does not have any effect upon that.* I defer to the judgment of the Senator in charge of the bill, but that would be my impression.

Mr. Van Nuys. *The Senator from Idaho is correct.*" (80 Congressional Record, p. 9903)*

Further proof that Congress has not considered basing point prices as already unlawful under previous law and has not intended to prohibit selling at delivered prices computed by the basing point method, is found in the fact that other bills have been proposed to Congress containing express prohibitions against the basing point method of selling, all of which have failed of enactment. Thus, in 1936, there was pending in the Senate S. 4055 (and a counterpart in the House, H. R. 10385), which was expressly aimed at eliminating the basing point. Hearings on this bill were held before the Senate Committee on Interstate Commerce from March 9 to April 10, 1936, but the bill was never

* Other excerpts from Volume 80 of the Congressional Record containing comments on the Robinson-Patman bill are set out in Appendix C hereto.

enacted. Another bill to the same effect which never reached enactment was S. 3744. Here again it is a necessary inference that these bills, expressly designed to make basing point prices unlawful, would not have been introduced if it had been considered that such prices were already prohibited by existing laws; and the failure of Congress to enact these bills into law plainly demonstrates its intention that sales at basing point prices should continue to be permitted.

Hence it is plain that if the intention of Congress is to be given proper effect, it must be held that Section 2(a) does not prohibit selling at delivered prices computed by the basing point method and that the words "discriminate in price" used in Section 2(a) do not embrace differences in delivered prices at different destinations arrived at by that method; that is, the method under which all buyers at each destination pay the same delivered price arrived at by adding to a base price the freight rate to that destination from a basing point, which is or may be different from the actual point of shipment of the goods to them. Whether the basing point price method is or is not desirable is a problem in economics as to which the opinions of writers and experts may differ. But this makes it all the more evident that if basing point prices are to be prohibited, this is a matter for Congress. Certainly the courts should not, as did the Commission, by a tortuous construction of simple language which does not by its terms prohibit the basing-point system, give to the statute a construction which the uncontestable evidence shows is directly contrary to the intention of Congress.

C. **Even if it should be held that such differences in delivered prices as result from the basing point method are not excluded from the purview of Section 2(a), still the record here does not establish a violation of that Section.**

If, despite the language and legislative history of Section 2(a) and contrary to the foregoing argument, it be

held that such differences in delivered prices as result from the basing point method may constitute price discrimination within the prohibition of Section 2(a), we come to the question whether on the facts here a finding of a violation of that section is warranted by the record.

1. The record does not support a finding of "discrimination in prices".

Assuming, for the sake of argument, that the freight rates actually paid afford the criterion of permissible price differences, and that the differences between petitioners' delivered prices at different destinations resulting from the use of the basing point method were greater or less than the differences in the freight rates from the points of actual shipment, still this alone would not prove discrimination, since the term "discrimination" involves something more than an unwarranted difference. Congressman Utterback, in explaining before the House the meaning of the term "discriminate" as used in the Act, said:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that *some relationship exists between the parties to the discrimination which entitles them to equal treatment*, whereby the difference granted to one casts some burden or disadvantage upon the other. *If the two are competing in the resale of the goods concerned, that relationship exists.* Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination." (80 Congressional Record, p. 9559)

It has been held under the provisions of the Interstate Commerce Act prohibiting discrimination in freight rates that discrimination is more than mere difference and does

not exist unless the difference is the cause of substantial benefit to certain shippers and of injury to others.

> *Sugar from Mobile, New Orleans, etc., to Alabama and Georgia,* 237 I. C. C. 221, 226;
>
> *Federated Metals Corp.* v. *Pennsylvania R. Co.,* 161 I. C. C. 287, 288;
>
> *Bunker Hill & Sullivan M. & C. Co.* v. *N. P. Ry. Co.,* 129 I. C. C. 242, 246;
>
> *Burlington Shippers' Asso.* v. *A. T. & S. F. Ry. Co.,* 109 I. C. C. 694, 699.

This means, as Congressman Utterback said, that there must be a competitive relationship between the buyers concerned to whom the different prices are charged.

> *Kistler Leather Co.* v. *Pittsburg, S. & N. R. Co.,* 169 I. C. C. 247, 252.

Following this same thought, it has been held, further, under the Interstate Commerce Act that discrimination contemplates that there must be an alternative in the method by which the injury and benefit may be eliminated; that is, either by raising the price charged to the favored customer or reducing the charge to the prejudiced customer, or a combination of both, and that unless these conditions exist no discrimination is present.

> *Texas & P. Ry. Co.* v. *United States,* 289 U. S. 627, 650;
>
> *American Salt Corp.* v. *Aberdeen & R. R. Co.,* 220 I. C. C. 369, 374;
>
> *Moline Consumers Co.* v. *Chicago, B. & Q. R. Co.,* 213 I. C. C. 135, 142.

In *Duluth Chamber of Commerce* v. *C. St. P., M. & O. Ry. Co.,* 122 I. C. C. 739, the Interstate Commerce Commission said that to prove discrimination in violation of Section 3 of the Interstate Commerce Act "it must be shown that

mplainant suffers injury by reason of the discrimination, d that this injury will cease if the discrimination is re- oved, *regardless of the manner of its removal.*" (Italics rs.)

In testing whether discrimination really exists on the rticular facts in this case, it is appropriate, therefore, to quire what alternative petitioners would have as to the ethod of eliminating the alleged price discrimination, and w their customers would be benefited thereby. For ex- mple, in the case of a candy manufacturer at St. Joseph, o., on the theory of the Commission he is discrimi- ated against in favor of a competitor to whom deliv- y is made from Chicago if the price he pays is com- ted on the basis of the freight rate from Chicago when ipment is really made to him from Kansas City. But this theory, the ground of the complaint would be iminated if petitioners should close their Kansas City ant (as indeed they have been forced to do from time time due to shortage of corn), or if for any reason they ould ship to the St. Joseph manufacturer from Chicago. is impossible, however, to see that the St. Joseph manu- cturer would be in any way benefited thereby. He would ill pay the same price for his corn syrup which is now aimed to be discriminatory, but which would then, on e Commission's theory become entirely lawful. If, on the her hand petitioners were to leave their Kansas City plant operation and were to charge a delivered price on goods ipped from there made up of a base price plus freight om Kansas City to destination, it is entirely within the alm of probability that two customers at the same des- nation, one of whom was served from Chicago and the her from Kansas City, would be paying different prices on e same day, or within a period of a very few days. This ould create instead of remove discrimination and would rtainly cause more dissatisfaction among petitioners' stomers than the present method of determining deliv- red prices, under which all buyers at the same point pay e same price regardless of petitioners' election as to the lant from which to ship the goods.

Hence we submit that in the situation of petitioners here, such differences in delivered prices at different destinations as result from their use of the basing point method cannot be considered price discrimination within the meaning of Section 2(a).

2. Even if price discrimination has been shown, the record fails to establish a violation of Section 2(a) because it fails to show that the price discrimination will have the effects specified in the statute.

It is not all discrimination in price which is prohibited by Section 2(a), but a violation of the statute exists only

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them; * * *"

This language requires careful examination and analysis.

(1) In the first place, what is meant by the words "where the effect * * * *may be*"? As was said in the preliminary analysis of the statute at the beginning of this point, it is submitted that these words must indicate something more than a vague, hypothetical or theoretical possibility and were intended to connote the existence of a reasonable probability. Congress is not concerned with preventing consequences whose occurrence does not appear reasonably probable within the scope of man's actual daily life. The words "may be" with similar context were found in Section 2 of the Clayton Act before its amendment by the Robinson-Patman Act and occur also in Sections 3 and 7 of the Clayton Act. Thus Section 7 prohibits the acquisition by one corporation of the stock of another

> "where the effect of such acquisition *may be* to substantially lessen competition * * *, or to restrain such commerce * * *, or tend to create a monopoly of any line of commerce."

As used in Section 2(a) the words "may be" have not, so far as we have discovered, been judicially interpreted. But in a substantial number of cases the courts have interpreted these words when used in these other sections as connoting more than "a mere theoretical possibility" and as used to indicate "a substantial probability", or "actual tendency".

International Shoe Co. v. *F. T. C.*, 280 U. S. 291 (1930), at p. 298;

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), pp. 356-357;

Standard Oil Co. v. *F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

Pennsylvania Railroad Co. v. *I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

Temple Anthracite Coal Co. v. *F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

Vivaudou, Inc. v. *F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

United States v. *Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

In the *Standard Fashion Co.* case, this Court said (pp. 356-357):

> "* * * But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or *create an actual tendency* to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." (Italics ours.)

Citing that case, Judge Woolley, speaking for the Court in *Standard Oil Co.* v. *Federal Trade Commission*, said (at p. 86):

> "* * * To make clear the principle upon which we shall examine the testimony and decide these cases,

it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the *Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission,* and ultimately the courts, *should inquire not whether a given practice* may possibly lessen competition or possibly create a monopoly, but whether it *probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly.*" (Italics ours.)

In view of the obvious similarity, both in language and purpose, between Section 2(a) and the provisions involved in these cases, the decisions cited are necessarily precedents for the construction of the words of Section 2(a). Although the question has not been expressly discussed in cases involving that section, it is perhaps significant that when this Court has upheld findings of violations of Section 2 it has appeared that the adverse effect on competition was not only probable but actual. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245 (1928); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. (2nd) 234 (C. C. A. 2nd); certiorari denied, 279 U. S. 858 (1928).

(2) The next question is whether there is substantial evidence here to support a finding of an "actual tendency" to monopoly, or a reasonable probability that the price differences between buyers at different points resulting from petitioners' delivered price practice will have one or more of the other consequences specified.

The record on this point consists only of the stipulation between counsel quoted at pages 7 to 8 above (R. 198-199).

Any finding which does not have substantial factual support in that stipulation is unwarranted.

There are two sorts of effects specified in the statute: (a) effects on competition by or with the persons alleged to discriminate, *i. e.*, petitioners, and (b) effects on competition by or with purchasers from them.

(a) Neither in the stipulation nor elsewhere is there anything whatever bearing upon the effect of petitioners' basing point practice upon petitioners themselves or upon the line of commerce in which they, themselves, are engaged. The Commission made no preliminary finding that the practice tends to create any monopoly in petitioners in the sale of corn syrup, or that it lessened competition with or by petitioners. The Commission's conclusion that the alleged discriminations tend to create in petitioners a monopoly of the processing and refining of corn and of the sale and resale of the by-products of such processing and refining, insofar as it is concerned with the basing point practice, is, therefore, entirely without support in the evidence and entirely unsupported by Findings of Fact. It is, moreover, inconsistent with the fact that the Commission has made a similar charge with regard to all other units of the corn industry. Because obviously it is a negation of terms to say that each of several members of an industry has a monopoly.

The court below, while mentioning the Commission's conclusion as to the effect of the pricing practice upon competition with petitioners, apparently rejected it and confined its consideration to the effect upon purchasers from petitioners.

(b) Turning to the effect of the basing point pricing practice on purchasers from petitioners, is there any finding or evidence to support a finding, necessary to establish a violation of Section 2(a) that the probable effect of petitioners' basing point delivered price practice will be "to injure, destroy or prevent competition" with any candy

manufacturer who *"knowingly"* receives the benefit of the alleged discrimination?

(i) The Commission's finding was that the alleged discriminations in price "have resulted, and do result, in substantial injury to competition among purchasers of such products" (R. 487).

For the sake of preserving the point but without indulging in extended argument here, we raise the question whether, apart from the other considerations discussed, a finding of a violation of Section 2(a) of the Robinson-Patman Act could properly be made in the absence of a showing as to particular buyers alleged to be preferred and prejudiced by the alleged discrimination and whose ability to compete is claimed to be affected.

In *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81 (C. C. A. 3rd, 1922), the Court said (p. 87):

> "Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize', and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade' and 'restrict the common liberty to engage therein' * * *."

The phrase "substantially to lessen competition or tend to create a monopoly" was in the original Clayton Act and while its exact meaning has never been precisely defined, it plainly connotes some fairly serious effect on competition

generally, rather than what Mr. Justice HOLMES has called "the small dishonesties of trade", affecting only the individuals immediately concerned.*

Thus, it was held, in construing this language in the Clayton Act as it was prior to the passage of the Robinson-Patman Act, that a violation of the Act did not exist unless the evidence of a "substantial lessening" of competition was "clear, definite and convincing".

International Shoe Company v. *Federal Trade Commission*, 280 U. S. 291 (1930);

Vivaudou, Inc. v. *Federal Trade Commission*, 54 F. (2d) 273 (C. C. A. 2nd, 1931).

See also:

Federal Trade Commission v. *Raladam Company*, 283 U. S. 643 (1930);

Van Camp v. *American Can Company*, 278 U. S. 245 (1928);

Porto Rican American Tobacco Company v. *American Tobacco Company*, 30 F. (2d) 234 (C. C. A. 2nd, 1929).

Of course, before there can be a substantial lessening, or a substantial injury, destruction or prevention of competition, there must be substantial competition. As this Court said in *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291 (1930) (at p. 298):

> "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the

* Gordon, "Robinson-Patman Anti-Discrimination Act", American Bar Association Journal, Vol. XXII, p. 594; 50 Harvard Law Review, 106, 108 and cases there cited.

public. Obviously such acquisition *will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance.*" (Italics ours.)

An examination of the record, including the stipulation entered into with reference to the sale of corn syrup, will show that the evidence wholly fails to meet the rule laid down by this Court in the case above cited. The stipulation contains merely the statement that the candy manufacturers who purchase syrup from petitioners "are competitively engaged in the sale of such candy". But how substantial the competition is, whether it is in the field of candies in which important quantities of corn syrup purchased from petitioners and shipped from Kansas City are used,—on such points the record is silent.

On the basis of the stipulation and in the light of the law, the most that the Commission and the court below could properly have found as to the effect of petitioners' pricing practice was something like this:

> That *if* petitioners, for manufacturing or other reasons, fulfill a contract of sale to a candy manufacturer by shipment to him from Kansas City rather than Chicago; and *if* the candy manufacturer is manufacturing and selling cheap candies, sold at a few cents a pound and a narrow margin of profit, in which corn syrup is used in the greatest proportion; and *if* he is selling such candies to chain stores and other purchasers of large quantities to whom a small difference in price is determinative in placing their business; and *if*, by reason of petitioners' pricing method, he pays a higher delivered price than a price computed in some other way; and *if* he attempts to recover these higher costs by increasing the price of his candies or makes only selected sales on a non-price basis; and *if* other cost factors are not present to offset the higher price and the consequence is to reduce his profit *pro tanto* (as compared with what it would be if his price

were computed in some other way), then "the result may be to diminish the ability of those paying the higher prices for the syrup to compete with those paying the lower prices."

Certainly neither such a finding nor the stipulation itself satisfies the requirement of the statute as interpreted by the courts that the evidence shall be clear and convincing of a probable substantial lessening of or injury to competition among purchasers from petitioners.

The court below expressed the view (R. 531) that it was "irrefutable from the facts that substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities". But we submit that there was no evidence to support such a statement.

It is apparent that both the Commission and the court below, instead of accepting the stipulation as the full statement of the facts, embroidered thereon and indulged in deductions and assumptions as to other facts which were not, and most certainly would not have been stipulated by petitioners. This was clearly improper.

In *Koppel* v. *Massachusetts Brick Co.* (Sup. Ct. of Mass., Franklin 1906), 192 Mass. 223; 78 N. E. Rep. 128; the Court stated the long established rule to be:

> "Upon a submission of an action on an agreed statement of facts, the decision is to be made upon the facts actually stated. In the absence of a stipulation that inferences may be drawn from the facts stated, the question is whether the matters agreed upon establish the plaintiff's case. Neither the superior court nor this court can draw inferences of fact either for or against the plaintiff. Schwartz *v.* Boston, 151 Mass. 226, 24 N. E. 41; Mayhew *v.* Durfee, 138 Mass. 584."

In *Morse* v. *Fraternal Acc. Ass'n of America* (Sup. Jud. Ct. of Mass., Norfolk 1906), 190 Mass. 417; 77 N. E. 491, the same Court said at page 493:

> "* * * In this case the agreed facts do not show that he received the notice; and although they do con-

tain enough to warrant the court in drawing such an inference, if it were at liberty to do so, yet, in the absence of any provision to that effect, the court is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred, but is confined to the consideration of the facts to which the parties have agreed. Mayhew *v.* Durfee, 138 Mass. 584; Collins *v.* Waltham, 151 Mass. 196, 197, 24 N. E. 327."

The rule in the Federal courts appears to be similar. In *Lumbermen's Trust Co.* v. *Town of Ryegate*, 61 F. (2d) 14 (C. C. A. 9th, 1932), at page 17 the Court said:

"* * * *Suffice it to say that where the agreed facts are the ultimate facts as distinguished from merely evidentiary facts, the ultimate facts thus agreed to have the force and effect of a special verdict.* * * * For it would seem clear that the stipulation of the parties as to an ultimate fact so far as it goes is at least equivalent to an admission in the pleadings, and that where the admissions in the pleadings, together with the stipulated ultimate facts require judgment in favor of the plaintiff, it is an error of law reviewable on appeal if the court enter judgment for the defendant."

An extended discussion of the subject is contained in the opinion of the same court in *Kapiolani Maternity and Gynecological Hospital* v. *Wodehouse et al.* (1934), 70 F. (2d) 793, at pages 797ff. The court reviewed the decisions of many jurisdictions and concluded that where a stipulation fails to state all of the ultimate facts necessary to a decision, the court should not indulge in inferences but should dismiss the proceeding or remand it for further evidence or stipulation.

To the same effect was *Elbee Chocolate Co.* v. *United States*, 64 F. (2d) 117 (C. C. A. 2nd, 1933).

The fact that the stipulation here may have been inexact and ambiguous does not justify inferring additional facts therefrom. In *Compania General de Tabacos de Filipinas*

v. *Collector of Internal Rev. (1929)*, 279 U. S. 306, at page 310, this Court said:

> "The ambiguous phraseology of the stipulation failing to disclose precisely how the business was done, we may not speculate as to its actual character. See Cochran *v.* United States, 254 U. S. 387, 393."

(ii) Moreover, and this is important, since it is apparently upon this phase of the matter that the decisions below rest, this provision is satisfied only when the preferential price is *knowingly* received by a preferred customer. There is not a word of proof in the record to substantiate a finding that any candy manufacturer to whom corn syrup is shipped by petitioners from their Chicago plant *knows* that he is receiving the benefit of some price discrimination in his favor and against another manufacturer at another point, to whom shipment is made from Kansas City rather than from Chicago.

The Commission made no finding that any purchaser had knowledge that he was receiving a preference, and in this respect its conclusion was defective. The Circuit Court of Appeals, however, endeavored to supply the deficiency (R. 533) by arguing that the pricing method and its operation were "well known". But apart from the impropriety of indulging in such an assumption the lower court failed to recognize that it could not possibly be "well known" to any customer at the time of a contract of sale whether petitioners, thirty days thereafter would ship to him from Kansas City or from Chicago. On the agreed facts that was a matter entirely within petitioners' control and governed by the circumstances at the time (R. 196).

(c) But more than this, in connection with all phases of the effect of the alleged discrimination, it was stipulated that the consequences described in the terms "the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices" may never happen at all. This is because it was further stipulated that

"These results may be avoided * * * by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets, and delivery of the finished candies no matter how such differences are brought about."

The words "may be" in one sentence of the stipulation are entitled to equal meaning with those same words when used in another sentence and leave the record as showing that the result described is just as likely not to happen as to happen.

The basing point price system has been employed by petitioners for years. The period covered by the Robinson-Patman amendment extends back to 1936. Certainly if there were ever any reasonable probability that the use of the basing point method in determining their delivered prices would have the effect of substantially lessening competition or tending to create a monopoly or of injuring or destroying competition with petitioners or with any one of their customers, this probability would have become a fact demonstrable by proof of actual experience by the time the hearings in this proceeding were concluded. The Commission, however, produced not one scintilla of evidence of actual results by statistics or otherwise.

Finally, under the circumstances here, we submit, that even if the consequences upon competition specified by the statute were established by the proof, it was wholly arbitrary and erroneous for the Commission to assume that these consequences were "the effect" of the supposed discrimination in the price. The word "effect" connotes a causal connection. When a candy manufacturer at St. Joseph, Missouri, enters into a contract to purchase corn syrup from petitioners, presumably he takes into account at once in his business the price agreed upon in the contract. Therefore, any bearing which that price may have upon his own sales price or his ability to compete with other candy manufacturers is not affected in any way by whether the corn syrup delivered to him under the contract

is ultimately shipped from Kansas City or from Chicago. However, it is only if shipment is made from Kansas City that price discrimination exists under the Commission's decision—there is no discrimination if shipment is made from Chicago. Hence the existence or non-existence of the alleged price discrimination can have no relation to the buyer's competitive ability and the latter cannot be an "*effect*" of the former.

Under all these circumstances, it is submitted that there is no evidence sufficient to support a finding that selling by petitioners at delivered prices arrived at by the basing-point system has had as its reasonably probable effect any substantial lessening of competition or tendency to monopoly or injury to competition with any persons, either petitioners or knowing customers. The Commission's decision was therefore arbitrary.

3. In finding discrimination in price within the meaning of Section 2(a) and in finding that such discrimination would be the cause of the results specified by the Act, the Commission's decision and order were based upon an erroneous interpretation of the statute as applied to the facts here and were arbitrary in disregarding the evidence as to the circumstances of petitioners' two plants and the necessary inferences therefrom.

In determining in any particular case whether there is a violation of the statute, we urge that the words "to discriminate in price" must be given a realistic application in the light of the peculiar facts of that case.

As previously stated, the evidence shows that petitioners' main plant at Argo in the Chicago Switching Limits began operations in 1910 and that at that time petitioners adopted the practice of determining their delivered prices at different destinations by adding to a Chicago base price the freight rates from Chicago to such destinations. Twelve years later petitioners opened another plant at Kansas City, Missouri. Petitioners continued to sell at delivered prices and to enter into sales contracts with buy-

ers at different destinations, which gave these buyers thirty days after the dates of the contracts within which to call for shipment. A contract would be meaningless without a price and it was therefore obviously necessary that the contracts should provide agreements as to the delivered prices. It was stipulated on the record here that whether shipment, pursuant to a particular contract of sale, should ultimately be made from the Chicago plant or from that at Kansas City was a matter entirely within the discretion and control of petitioners, whose determination depended upon conditions at the two plants at the time of shipment (R. 196).

Under these circumstances we believe that the Commission and the court below erred in concluding that Section 2(a) should be so construed that if 25 days after a contract had been entered into and a delivered price agreed upon, the buyer should call for delivery and if at that time the petitioners, because of conditions at the plants, should elect to make delivery from the Kansas City plant, there would be price discrimination against the buyer and in favor of some other buyer at a different destination; whereas, if the Kansas City plant had been closed down or had never been built, or if for any other reason petitioners had made the particular shipment to the buyer from their Chicago plant, the same contract and the same price would not constitute discrimination within the meaning of the statute.

Moreover, under the circumstances here, with petitioners having plants both at Chicago and Kansas City and with the determination whether a particular order shall be filled by shipment from one plant rather than the other resting entirely in petitioners' discretion, prohibition of the basing point method of determining delivered prices and a requirement that petitioners charge in each instance a delivered price computed by using as one factor the actual freight charges paid on the shipment, instead of eliminating discrimination, would immediately create the possibility of more serious discrimination than can possibly exist under present practices. At the present time

all buyers in a given locality pay the same price. The basing point method or some variant thereof seems necessary to accomplish this result. For it may very well happen that because of operating conditions petitioners might have reason to ship to one buyer from Chicago and the same day fulfill a contract of sale to another buyer at the same destination by shipment from Kansas City. Certainly discrimination would be much more real if, under these circumstances, different prices were charged to the two buyers in the same community, as the Commission's order would require, than any such discrimination as is found by the Commission here.*

The Court below failed entirely, as did the Commission, to discuss this phase of the matter which exists here because of the fact that petitioners have two plants, one of them located at Chicago, the base point. Judge LINDLEY in his opinion (R. 530) refers to the "inclusion of a fictional cost of delivery, having no justification in fact" and to "arbitrary fixation of prices discriminating illegally as between competitive customers." Certainly a method of pricing whereby petitioners are able to offer the same

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* In the hearings before the Senate Committee on Interstate Commerce with reference to S. 4055, one of the bills designed to outlaw basing point prices, objection to the bill was made on behalf of representatives of grain millers on the ground that grain and its products generally move outbound from milling points under so-called transit or proportional rates, which vary with the initial points of origin of the grain. (Hearings before the Committee on Interstate Commerce, United States Senate on S. 4055, March 9 to April 10, 1936, pages 380 ff.) This Court is familiar with the operation of transit tariffs and proportional rates in connection with the movements of grain products. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248; *Grain and Grain Products*, 205 I. C. C. 301. The submission of the present proceeding to the Commission was not complicated by the injection of this transit and proportional rate problem. It has been assumed that the local rates from Chicago and Kansas City, respectively, represent the freight charges actually paid. Of course, if transit or proportional rates are applicable, there may be different outbound freight rates paid on two shipments from Kansas City to a single destination, depending upon the inbound rail billing which is used. This would inject a further difficulty in maintaining equal prices for all buyers at a given destination if delivered prices which do not reflect actual freight should be done away with.

delivered price to all customers at a given destination regardless of the plant from which petitioners may be compelled or elect to ship, is not fairly described as an "arbitrary fixation of prices." And a freight factor in a delivered price which proves to be less than the actual freight charges paid is just as "fictional" as one which is higher than the freight expense ultimately incurred. Judge LINDLEY does not explain how otherwise than by their present method petitioners, having two plants and not knowing from which plant a shipment will have to be made on a given day, can on February 1 contract to sell to a buyer in St. Joseph, Mo., for shipment any time within thirty days thereafter and avoid the possibility that the freight factor in the delivered price would ultimately prove to be "fictional" because either too high or too low.

The law does not require, and neither the Commission nor the court below has held, that petitioners must sell only f. o. b. shipping point and that they are prohibited from contracting for delivered prices and for shipments over a considerable period. Neither does the statute provide, nor has it been held below, that it is unlawful for petitioners to operate two plants from which the freight rates to a common destination are different. And yet these would be the necessary consequences if Section 2(a) had the meaning and effect given to it by the decisions below.

On the same day that the Circuit Court of Appeals decided the present case, the same court rendered a decision in a companion case involving the A. E. Staley Manufacturing Company, one of petitioners' principal competitors, *A. E. Staley Mfg. Co. v. Federal Trade Commission*, 144 F. (2d) 221, now before this Court as number 559. It there held, with Judge MAJOR dissenting, that the basing point pricing system violated Section 2(a) but that since the system was in general use in the industry, the Staley Company was justified in making its delivered prices by the basing point method in order to meet competition. This Court granted certiorari in that case on November 20, 1944. The practical result of the two decisions is to give a company owning one plant which is located away

from a basing point a competitive advantage over a company which owns two plants, of which one is located at a basing point. An interpretation of the statute which produces this result must be wrong.

It seems altogether probable that, as interpreted by the Commission, the enforcement of Section 2(a) would have no other result than to discourage the decentralization of production. Thus a very important inducement for a concern like petitioners to construct an additional plant at a point such as Kansas City may well be to take advantage of greater proximity to certain markets and to secure a return on the investment in such a plant through an added profit by reason of the lesser transportation cost incurred in shipping from the new plant to those markets. In the *Cement* case, *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 588, the court, speaking through the present Chief Justice, at pages 597 to 599 of its opinion, stressed the importance of the basing point system in thus encouraging and promoting competition between producers at different localities.

The purpose of the statute is to preserve competition and prevent monopoly by prohibiting discrimination whose probable effect would be to destroy competition and foster monopoly. It should not be given an application which will defeat its own purpose in both respects.

Conclusion as to petitioners' basing point method of determining its delivered prices.

We submit that in view of its general use in industry, and the fact that in petitioners' situation the basing point method of determining delivered prices is the most practical, the fairest to customers, the least likely to provoke charges of discrimination, and the most productive of competition, it should not be found unlawful under Section 2(a) unless it is clearly prohibited by that section in definite and unmistakable language, and unless the record convincingly shows that its use by petitioners actually has or most prob-

ably will have the consequences sought to be prevented by Section 2(a).

We submit further that far from Section 2(a) prohibiting sales on the basing point price method, such a prohibition can be read into its language only by a strained construction of the words "discriminate in price", and that the legislative history of the Act and the debates in Congress show beyond doubt not only that such a strained construction is not warranted, but that when Section 2(a) was enacted, it was the definite intention of Congress *not* to prohibit the use of the basing point price method and that such delivered price differences at different destinations as might result therefrom were not comprehended by the words "discriminate in price".

Finally, we submit that the record here utterly fails to show that petitioners' delivered price practice has or has had any of the consequences which must be found in order to render price discrimination unlawful under Section 2(a) and that the Commission's decision was arbitrary and based on errors of law.

POINT II

Petitioners did not violate Section 2(a) in certain instances where they allowed customers more than the usual periods for booking orders or calling for deliveries.

The facts pertinent to this phase of the case are stated at pages 9 and 10 of this brief.

A. The transactions discussed did not involve price discrimination within the intent of Section 2(a).

Despite its indefiniteness in many regards, Section 2(a) is precise in one respect: namely, that the only thing that comes within its prohibition is "to discriminate in price.". As we have said before, the statute does not define what is meant by "price" or "discriminate in price", but at least the use of the single word "price" is significant. Every contract of sale contains provisions not only as to

price but as to terms and conditions. Had Congress intended to prohibit not only discrimination in price but also discrimination in terms and conditions in connection with sales, it could and should have done so by appropriate language, and the absence of any reference to "terms and conditions" requires the conclusion that price was the only element of sales contracts within the prohibition of the statute.

That paragraph 2(a) deals only with "price" and not with "terms and conditions" is indicated clearly by the fact that, as originally reported to the Senate, the bill did prohibit discrimination not only in price but also in "terms of sale" (Senate Report No. 1502, 74th Congress, 2nd Session); and that the latter words were deleted by the Conference Committee before the bill was enacted into law. The Conference Committe said:

> "The managers were of the opinion that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discrimination in price *within the remainder of the subsection.*" (Italics ours.) (House Report No. 2951, 74th Congress, 2nd Session, p. 5.)

And this is emphasized by "the remainder of the subsection", paragraphs (c), (d) and (e), which specifically prohibit certain terms and conditions or discrimination therein. If all terms and conditions which might affect the value of the consideration involved in a sale were embraced within the term "price" in Section 2(a), these other paragraphs would be superfluous.

Consequently, in the instances where petitioners allowed purchasers to take delivery of goods ordered by them at the old price more than thirty days after the announcement of a price change, Section 2(a) was not violated because there was no discrimination in the price contracted for; there was merely a change in the terms as to the time within which orders for delivery had to be placed.

Looked at in another way, what was done in these instances amounted, in effect, to making a contract for future delivery of a commodity with one customer while refusing to make the same kind of contract for the same future

delivery with another customer. It is submitted that this is the sort of situation which falls within the third proviso of Section 2(a), which reads as follows:

> "That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

B. TO THE EXTENT, IF AT ALL, THAT ANY OF THESE TRANSACTIONS INVOLVED PRICE DISCRIMINATION, THE ALLEGED LOWER PRICES WERE MADE IN GOOD FAITH TO MEET THE EQUALLY LOW PRICES OF COMPETITORS.

With respect to these alleged discriminations, the record shows quite clearly, and certainly at least as clearly as it shows the "discriminations" themselves, that these several variations from their regular practices were made by petitioners in order to meet competition.

Thus, as to the acceptance of orders at the old price more than five days after a price change, Witness Cull, called by counsel for the Commission and asked over objections whether he knew of any such instance, said that he could not recall any; "there might have been an order here and there", but that "it was a rather exceptional situation and *it would only be one in order to meet a competitive situation which was brought upon us*" (R. 220). (Italics added)

Questioned further, the same witness said: "If that were done, *it would be because some competitor has offered them the same proposition;*" (R. 227) and that "There have not been any such cases of undue lapse of time, but in cases where there was some justification for it" (R. 227).

With reference to the delivery of corn syrup after the expiration of the thirty-day shipping period at the old lower price, the same witness who testified as to this variation also testified that it was due to competitive conditions (R. 220, 221). He knew of only one customer as to which this had been done and remembered "on a couple of occasions of shutting off this account on the expiration date

and suffering a loss of business." And he testified, "we were told * * * that the original loss of business was because others carried them along so we found it was necessary to protect the business that way, by making a little longer delays" (R. 221).

Under the doctrine expressed by this Court in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197, and in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580, that an administrative agency must make findings of fact on all matters concerning which substantial evidence has been received, petitioners were entitled to a finding based on the undisputed evidence that, as to these practices, petitioners were meeting competition. See, also, *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258 (C. C. A. 7th, 1941); *A. E. Staley Mfg. Co.* v. *F. T. C.*, 135 F. (2d) 453 (C. C. A. 7th, 1943).

The majority of the Circuit Court of Appeals, however, concluded the portion of their opinion dealing with these practices with the remark that

> "If petitioners' prices were arrived at in the same manner, to approve the defense we would be driven to the inconsistent position of approving one evil practice because it was indulged in in order to meet a similar evil practice."

With all respect, it is submitted that here the court was attempting to substitute its judgment for that of Congress as to what the statute should provide. For the statute definitely contemplates that, when there is discrimination, it is excused if it is the result of meeting competition in good faith. This is not a statute against discrimination *per se*, but against monopoly. It would defeat the purpose of the statute to hold that petitioners could not compete with others in their field by meeting their prices and terms.

C. There is no proof whatever that these transactions had any effect upon competition.

These transactions were not the subject of stipulation. The Commission made its case entirely through the testi-

mony of witnesses. It had ample opportunity to produce evidence that the effect or probable effect of these transactions was either a substantial lessening of competition between petitioners and other concerns in the corn industry or injury to competition among petitioners' purchasers, if such had been the fact. No evidence of this character was produced.

Consequently, we submit that a *prima facie* showing was not made that these transactions were in violation of Section 2(a) and that the Commission's findings of such violations were wholly arbitrary.

The arbitrary character of the Commission's action in this particular is emphasized by what the Commission actually did. It so arranged its findings and conclusions as to have it appear that it did make findings on this point with regard to these transactions. It did this by describing these transactions in Paragraph Six of its Findings of Fact, while in Paragraph Seven it made various findings regarding the effect of price differences upon candy makers and their competitive ability (R. 471-474). However, the matters set forth in Paragraph Seven were based upon a stipulation which was entered into by the parties solely with reference to differences in delivered prices resulting from the basing point method and petitioners' so-called container differentials, and this stipulation and the facts therein agreed to had nothing whatever to do with delayed bookings and deliveries. The Commission's action was, therefore, quite improper in endeavoring to have the contrary appear.

The court below was either misled by this action of the Commission or else indulged in assumptions without support either in the Commission's findings or in the evidence, when, through Judge Lindley, it said:

> "The Commission was amply justified in finding the practices reasonably likely to diminish the buying ability of those paying higher prices as compared with competitors paying the lower prices." (R. 534)

Moreover, the court's decision completely overlooks the requirement of the Act that where the claimed effect is upon competition, by or with customers it must appear that the customers "*knowingly*" received the benefit of the alleged discrimination. Had the lower court not overlooked this provision of the statute it could not have affirmed the Commission's conclusion because the court itself correctly found with respect to these transactions that "no customer knows how another is being treated" (R. 533).

POINT III

Petitioners did not violate Section 2(a) in selling in tank car quantities to tank wagon customers.

The facts pertinent to this point are stated at pages 11 and 12 hereof.

A. The Commission and the Court below erred in finding that these transactions violated Section 2(a).

What has been said in the previous point with regard to the lack of proof of any consequences of the transactions there discussed upon competition is equally applicable here.

Here there is even clearer and more specific proof that petitioners made these sales as they did under the compulsion of competition (R. 256). There is undisputed testimony in the record that the Hubinger Company had offered to sell tank car lots at the same price to the Crystal Pure Candy Company, which was normally a tank wagon buyer (R. 348, 349), and that Union Starch and Refining Company had also made the same offer to Peanut Specialties Company (R. 329, 330, 364).

Moreover there were present here two further facts completely ignored in the decisions below: first, that there was no price discrimination because the prices charged were petitioners' current prices for tank wagon sales (R. 268, 271, 373); and second, that there was no discrimina-

tion because petitioners offered the privilege to the entire tank wagon trade (R. 362-365).

Finally, we can find in Section 2(a) no prohibition against selling a tank car quantity to a customer, merely because he has usually purchased in smaller lots, provided that, if delivery is made in tank wagons, he pays the price for such delivery. That was the case here.

POINT IV

Petitioners did not violate Section 2(a) by according allowances or discounts to certain customers.

The facts on this question are stated on pages 13 and 14 hereof.

A. It was error to find that these practices violate Section 2(a) because there is no proof that they have the effect on competition specified by that section.

The record contains no proof of any complaint by any feed dealer or purchaser of feed and meal from petitioners or by any starch dealer or purchaser of starch from petitioners or of any injury suffered from the allowances accorded to the concerns described. There is no proof of any actual tendency to a monopoly in any line of commerce affected. All that the record shows as to the effect of the allowances or discounts in connection with the sale of gluten feeds and meal is a stipulation that in each case they were

> "sufficient, *if* and when reflected in whole or in substantial part in resale prices, to attract business to" (the several recipients) (R. 188-9, 190).

But *there is no evidence that they ever were so reflected* in the resale prices at any time during the entire period of years during which the contracts were in effect. It is submitted that this conclusively negatives the possibility of a finding that the reasonably probable effect of the con-

tracts and the allowances or discounts thereunder, was a substantial lessening of competition or an actual tendency to create a monopoly or a substantial injury to or destruction of the competition of others with the recipients.

Had such recipients cut their prices, it might, perhaps, have been a proper subject of inference that this would tend to give them a monopoly and adversely affect the selling ability of the buyers from petitioners. This might have been confirmed, if it were the fact, by proof that the sales of these recipients increased. But before the inference could be indulged at all it was necessary that it be shown that the allowances and discounts really were reflected by the recipients in their resale prices. This was a matter susceptible of proof were it the fact. No proof was offered. Petitioners did ~~not~~ and certainly would not have stipulated that such was the fact.

True, the stipulation states further that the allowances or discounts to the recipients concerned were

> "sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the resale of such feeds and meal products." (Stipulation, paragraphs 11, 19; R. 189, 190.)

There is nothing in the law, however, which fixes the amount of profit which a concern may earn. And there was no proof that the recipients used their increased profits in greater sales promotion. For all that the record shows, it is reasonable to assume that they distributed their profits, if there actually were any, to their stockholders, and left the competitive situation undisturbed. And this is not prohibited.

With respect to the discounts or allowances in connection with the sale of starch, the stipulation similarly states the possible effects of what was done upon the competitive situation, but there was likewise an *"if"* in this stipulation. There is no indication that during all the years when the alleged discrimination went on it ever actually resulted.

in any competitor losing a customer or in his competitive ability being impaired or in any actual tendency to a monopoly in those concerns receiving the discounts or allowances.

It is submitted that in the light of the previous argument and the decisions requiring proof of a real probability of substantial lessening of competition or an actual tendency to the creation of a monopoly, there can be no proper finding here of a violation of Section 2(a) to support a cease and desist order. Here, again, the Commission's order was arbitrary.

ARGUMENT WITH REFERENCE TO COUNT II OF THE AMENDED COMPLAINT ALLEGING VIOLATION OF SECTION 2(e) OF THE CLAYTON ACT.

The facts with respect to this phase of the case are stated at pages 15 to 18 hereof.

Preliminary Discussion of Section 2(e)

Section 2(e) of the Robinson-Patman Act reads as follows:

> "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Analyzing this paragraph, it is plain that a violation thereof is not established unless there is first shown discrimination in favor of a *purchaser*. If a party is not a purchaser, then discrimination in his favor or against him is not within the prohibition of this paragraph.

Secondly, he must be a purchaser of a "commodity bought for *resale with or without processing*". If he buys a commodity for use or for consumption or for any purpose other than *resale*, Section 2(e) is not applicable. And there is of course a question as to what is meant by "processing".

In the third place, the discrimination must be between two parties *as purchasers*. A discrimination which may be made between two parties in some other connection than as purchasers is not prohibited by Section 2(e).

Further, the discrimination must be of a particular kind. It must be discrimination accomplished by contracting to

furnish or furnishing or by contributing to the furnishing of services or facilities *connected with* the processing, handling, sale or offering for sale of "such commodity so purchased", which means of the commodity bought for resale.

And lastly there is no discrimination unless these things are done upon terms not accorded to all purchasers on proportionally equal terms.

POINT I

The arrangement with the Curtiss Candy Company was not made with it as a "purchaser" from petitioners.

It is submitted, in the first place, that Section 2(e) has no application here for the reason that the arrangement was not made with Curtiss Candy Company as a purchaser and therefore could not constitute discrimination "in favor of one purchaser" within the intent of the statute. This seems plain upon the record. The arrangement was made with the Curtiss Candy Company not because it bought dextrose from petitioners and as a purchaser of such dextrose, but because it was a candy company with a great distribution of its products and a very large national advertising program. The record shows that the purchase of dextrose by Curtiss from petitioners was no part of the arrangement. The arrangement held, even if Curtiss purchased all of its dextrose and all of its corn syrup from other suppliers. Therefore, whether or not the arrangement was discriminatory in favor of Curtiss and against somebody else, it was not discrimination by petitioners between *purchasers*.

The court below disagreed with this contention saying that the large amount spent by petitioners for advertising, coupled with the fact that their sales of dextrose and glucose substantially increased, was sufficient to support the inference that the arrangement was made for the purpose of "building up petitioners' sales of dextrose to it and to others" (R. 537). Naturally, the only purpose of petitioners in advertising is to build up their sales to the public generally. But granted that fact, it is submitted that with the witnesses for the Commission and petitioners testi-

fying without contradiction that the advertising arrangement had no relation to sales to Curtiss and that under it Curtiss was not obligated to buy any dextrose from petitioners, it cannot properly be found that this transaction was entered into with Curtiss as a purchaser. Curtiss' purchases were outside this arrangement.

Any other view of the situation than that here suggested would have the strange result that while petitioners could legally make such an advertising arrangement with a candy company which had not bought from it, it could not thereafter sell a pound of its product to that candy company without risking a charge of violating the law.

POINT II

There is not here involved any commodity bought for resale "with or without processing".

Curtiss is engaged in the manufacture and sale of candy, not in the sale of dextrose. The Commission has found that the dextrose purchased from petitioners by Curtiss Candy Company was purchased for use by it as an ingredient in the manufacture of candy, which candy was to be sold by the Curtiss Candy Company. The question under this point is whether when Curtiss has purchased dextrose, has then mixed and boiled or cooked it up with glucose, peanuts, chocolate, artificial flavoring, etc., and has thus produced another commodity called "candy", and has thereafter offered for sale the candy thus produced or manufactured, it is proper to find that the dextrose was purchased by Curtiss "for resale with or without processing" within the terms of the statute.

The word "for" in the phrase "bought for" implies a definite purpose on the part of the purchaser.

It is not contended that Curtiss bought dextrose "for resale * * * without processing". Obviously it did not. It would be impossible to pick out the grains of dextrose in their original state from a "Baby Ruth", one of the popular candies sold by Curtiss.

Can it be said with any reasonableness that if and when Curtiss bought dextrose from petitioners to be used as an ingredient in its candies, it did so for the purpose of processing it and reselling "processed dextrose"? To do so would seem like saying that a shoe manufacturer buying leather to make a shoe or thread to sew it up, buys these articles for the purpose of reselling processed leather and processed thread rather than shoes. . . .

We have been unable to find in the reports of the Senate and House Committees or in the debates on the Robinson-Patman bill anything which aids in defining the term "processing" as used in the bill.

In *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th, 1940), it was held that the manufacture of buttons from fresh water clam shells was not processing within the meaning of Section 13(a)(5) of the Fair Labor Standards Act of 1938, which exempted from the provisions of Sections 6 and 7 of the Act:

> "* * * any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by-products thereof."

Webster's Dictionary defines "processing" (in addition to clearly inapplicable definitions) as follows:

> "To subject (especially raw material) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as live stock for slaughtering, grain for milling, milk by pasteurizing, fruits and vegetables by serving and packing."

We submit that the term "processing" as used in Section 2(e) must connote the subjection of a material to treatment which leaves the material recognizable as still being

the same article and not merely an ingredient or unit of a new article; as, for example, the planing of wood, the rolling of iron, the ginning of cotton, the canning of vegetables, the milling of grain, the repacking of goods, etc. It does not mean the melting and mingling of a commodity as an ingredient with other materials to produce a different article with a separate and different purpose and a use of its own, so that the original ingredient can only be retrieved by a complicated chemical or mechanical operation which destroys the new commodity.

The record indicates clearly that the dextrose sold to Curtiss by petitioners was changed in its own form and combined with other materials to produce a totally different product, namely, candy. While in a sense there is dextrose in candy, as there is salt in a soup or oxygen in water, it is no longer in a form which makes it suitable for purposes for which dextrose, as such, is ordinarily employed. It is no longer available for use for intravenous injections, for use in the baking of bread, for use in the canning of fruits or vegetables, etc. In fact, without chemical analyses, one could not even tell that the candy contained dextrose.

This was recognized by the lower court. The reasoning by which Judge LINDLEY (R. 538) reached the conclusion that the dextrose purchased by Curtiss was a "commodity bought for resale with * * * processing" would bring every ingredient, raw material or component of any manufactured article within the terms of this statute. Had Congress so intended, it could have used a much simpler and more understandable term than "commodity bought for resale with * * * processing". Judge LINDLEY remarks that "processing is a relative term". But as interpreted by him it relates to everything.

The decisions cited by Judge LINDLEY are remote from the problem here and do not aid in the interpretation of the statute involved in the present case. In both *Cochrane v. Deener*, 94 U. S. 780, and *Sharpless Co. v. Crawford Farms*, 287 Fed. 655 (C. C. A. 2d), the Court discussed the meaning of the word "process" as a noun, in considering whether the "process" under consideration in each case

was patentable. But plainly the noun "process" may have a very different scope from the same word when used as a verb or participle. Moreover, in both cases there was more reason for using the word even as a verb than there is here, since in both the commodity involved did not lose its identity. *Cochrane* v. *Deener* involved a process for "bolting" flour; that is, apparently, grading it. The *Sharpless* case involved a "process" of blending cheese. But the flour and the cheese remained flour and cheese.

We may agree that the manufacture of candy is a "process" (noun). But to give to the word "processing" in Section 2(e) the meaning attributed to it by the lower court and the Commission would require the conclusion that the product sold by Curtiss was not a single article "candy" but "processed dextrose", "processed sugar", "processed nuts", "processed chocolate", etc.

The third case cited by Judge Lindley is *Bedford* v. *Colorado Fuel & Iron Corporation*, 81 P. 2d, 752 (Colo.). This case involved a sales tax on sales of tangible personalty which "enters into" the "processing" of or becomes an ingredient or component part of a product. Plainly, this decision is not helpful here.

The question here is largely one of first impression and the language must be interpreted as it is used in this statute. We submit that to say that Curtiss bought dextrose "for resale * * * with processing" would do violence to common sense use of words. To be sure, it is probable that one of the things which prompted Curtiss to enter into the advertising arrangement may have been a hope on its part that if its candy was proclaimed to contain dextrose with its "energy value", this would promote the sale of the candy. But this is no more than occurs if a baking company, to promote its sales, advertises that it uses iodized salt in its bread. It would hardly be said that the bread was therefore processed salt and that the baking company bought salt for processing and resale.

It is submitted, therefore, that the dextrose purchased by the Curtiss Candy Company from petitioners was not purchased "for resale with or without processing."

POINT III

There is no proof of discrimination between purchasers of dextrose for resale.

Even if it be conceded for the purpose of argument that the dextrose purchased from petitioners by Curtiss was purchased by it for the purpose of resale processed, this does not establish a case of discrimination. The discrimination prohibited by Section 2(e) must be discrimination between two or more purchasers, both of whom are purchasers of the commodity in question for the purpose of resale.

As the only proof of discrimination, counsel for the Commission inquired of the president of Curtiss whether his company competed with certain other companies which he named, *i. e.*, Nutrine Candy Company, E. J. Brach & Sons, M. J. Holloway Company, and Chase Candy Company. The record shows that the witness testified that the Nutrine Candy Company was not as large a competitor as many others because they were more in the bulk field; that Brach was more of a competitor than Nutrine, but not as much so as other companies; that Holloway would be a competitor and that Chase Candy Company of St. Joseph, Mo., would be a competitor only locally in their district (R. 301). The quantities of dry dextrose sold by petitioners to these concerns in the years 1936 to 1939 were stipulated. There is, however, no evidence whatever in the record that these concerns used petitioners' dry dextrose in their products, nor is there any finding by the Commission that the dextrose sold by petitioners to these companies was so used. While it may be presumed that having purchased dextrose, these concerns used it for some purpose, and that being candy manufacturers they probably used it in the manufacture of candy, still a finding of a violation of a statute cannot be predicated upon such assumptions of matters of fact, which should be readily susceptible of proof. For all that appears, these companies that are manufacturing candy may also make other products and may use the dextrose in these other products.

Moreover, even if they made nothing but candy, it cannot be properly assumed without proof that they used dextrose in the production of candies which were in competition with the candies manufactured by Curtiss.

Furthermore, a necessary issue here is whether not only Curtiss but also these other companies who purchased dextrose from petitioners did so for the purpose of resale. Evidence as to what they actually did was plainly essential and to support the order a finding was also necessary. Without both there is no basis for a conclusion that Section 2(e) was violated. If, like Curtiss, they used the dextrose in the manufacture of their candies, then for the reasons stated in the last point, they, too, were not purchasers of dextrose for resale.

It is submitted also that discrimination has not been shown unless it has been proved that the difference in treatment has been and is the cause of substantial benefit to one and of substantial injury to another of two or more competitors under similar conditions. Here there is no proof that any one of the four concerns named has suffered injury or that the arrangement with Curtiss was of a sort which these four concerns desired or sought and which petitioners denied to them. Certainly it cannot be held that a seller, in order to avoid the charge of discriminating in services or facilities to purchasers must force upon them arrangements which they have not sought and, so far as the seller knows, do not desire.

POINT IV

Petitioners did not furnish or contribute to the furnishing of any facilities connected with the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

From petitioners' standpoint, the object of the arrangement between petitioners and Curtiss Candy Company was to publicize the use of dextrose as an ingredient which could be used in the manufacture of candy. This publicity

was of immense value to petitioners. Petitioners did not enter into the arrangement as a service to Curtiss. Instead petitioners procured from Curtiss the great benefit of having Curtiss advertise that it used dextrose and that its candies were "Rich in Dextrose."

Moreover, since the arrangement contained no terms as to the purchase by Curtiss of dextrose or glucose from petitioners, imposed no obligation regarding and was not conditioned upon such purchase, but was effective entirely independently of the existence or non-existence of a relation of seller and purchaser between petitioners and Curtiss, it cannot be said that it was "connected with" the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

POINT V

There was no failure to accord the same arrangement to other purchasers from petitioners on substantially equal terms.

Judge Lindley, in writing the opinion of the lower court, said that the statute was satisfied

> "by proof of special services rendered one purchaser not rendered to similar competing purchasers engaged in the same business and using the same commodity for the same purpose."

This was said in rejecting petitioners' contention that even if Section 2(e) were otherwise applicable, discrimination between purchasers had not been shown.

It is a fact, of course, that except for Bachman and Lewis, petitioners had not entered into a similar cooperative advertising arrangement with any candy manufacturer other than Curtiss. But is the test of discrimination what petitioners actually "rendered" or what they offered and were willing to render? Was there discrimination against Mars with whom petitioners sought to make a similar arrangement but who declined to do so?

The record clearly indicates that petitioners had offered a similar arrangement to others before offering it to Curtiss Candy Company and had in fact entered into similar arrangements with at least two other candy manufacturers. Petitioners' officers testified to their willingness to make similar arrangements with other concerns whose circumstances as to distribution, advertising, etc., would make the terms and conditions similar. There is not a word of proof as to any purchaser who sought such an arrangement and was refused, or who even expressed a desire for it. In fact, it was testified that no other customer had done so. The word "accord" certainly does not require that an arrangement must be *forced* on every purchaser, especially when, in order to use dextrose and be able to advertise candies as "Rich in Dextrose", it is necessary for a candy manufacturer to alter his formulæ, to add new ingredients to his product and to change his wrappers and containers, all of which involve both risk and expense.

The phrase "on proportionally equal terms" has never been judicially construed so far as we are aware. Clearly, however, this cannot refer to mathematical proportions such as would force petitioners, merely because they were making profitable investments, to make other expenditures which would cause them to lose money.

Moreover, discrimination connotes different treatment of parties similarly situated. If a seller seeks national advertising it cannot be discrimination if he enters into an arrangement with one customer who provides national advertising and fails to enter into an arrangement with another customer who does not advertise nationally.

POINT VI

The Commission has no jurisdiction here because the dextrose was not sold by petitioners in interstate commerce.

Section 2(e) of the Clayton Act as amended is not, by its terms, limited to transactions in interstate com-

merce. However, this section should be construed as applying only to interstate transactions because, if otherwise construed, it would be unconstitutional as exceeding the power of Congress under the Commerce Clause of the Constitution. Furthermore, Sections 2(a), 2(c), 2(d), and 2(f) of the Act, by their terms, apply only to transactions "in the course of such commerce", and since all these sections are *in pari materia*, they should be construed similarly.

In the instant case, the record is completely barren of any evidence that the dextrose sold by petitioners to Curtiss Candy was sold in interstate commerce and since Curtiss is located at Chicago, Illinois, the same state in which petitioners' largest plant is located, presumably no interstate movement was involved. The same is true of the sales to the competitors of Curtiss to whom dextrose was sold, with the probable (although not proven) exception of the sales to the Chase Candy Company of St. Joseph, Mo. Furthermore there is no evidence that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. Under the circumstances, therefore, the Commission had no jurisdiction to deal with the Curtiss arrangement. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941).

We submit that the Commission's decision that petitioners' arrangement with the Curtiss Candy Company violated Section 2(e) was based upon errors of law and was without support in the evidence and arbitrary.

Final Conclusion

For the reasons discussed herein, it is submitted that the decision of the Circuit Court of Appeals, in so far as it dealt with alleged violations of Sections 2(a) and 2(e) of the Clayton Act, should be reversed and that the Commission's findings, conclusion and order in so far as they deal with matters alleged under Counts I and II of the amended complaint of the Commission, alleging violations of Sections

2(a) and 2(e) of the Clayton Act, should be set aside and annulled.

Respectfully submitted,

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Appendix A

Pertinent Provisions of the Clayton Act

SECTION 2, before the enactment of the Robinson-Patman Act:

"SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

SECTION 2(a), as amended by the Robinson-Patman Act:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof

or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

SECTION 2(e):

"That it shall be unlawful for any person to discriminate in favor of one purchaser against another

purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Appendix B

Some Discussions of the Basing-Point System.

In the Matter of U. S. Steel Corporation, F. T. C. Docket No. 760, 8 F. T. C. 1 (1927).

Fetter, The Masquerade of Monopoly (1931).

Note, 45 Harvard Law Review 548 (1932).

Report of Federal Trade Commission on Price Bases Inquiry—The Basing-Point Formula and Cement Prices (1932).

Report of Federal Trade Commission on Competitive Conditions in the Cement Industry (1933).

Report of the Federal Trade Commission on Practices of the Steel Industry Under the Code (1934).

Federal Trade Commission, Report to the President with Respect to the Basing-Point System in the Iron and Steel Industry (1934).

Federal Trade Commission, Report to the President on Prices of Sheet Steel Piling (1936).

Burns, The Decline of Competition (1936).

Hearings before the Committee on Interstate Commerce, the U. S. Senate on S. O. 4055 (1936).

Gustav Seidler, Control of Geographic Price Relationship Under Conditions of Fair Competition, N. R. A. Division of Review, Trade Practice Studies Section, Work Materials #86, March 1936.

Appendix C

Extracts from Volume 80 of the Congressional Record Dealing with the Elimination of the Anti-Basing Provision of the Robinson-Patman Bill.

HOUSE OF REPRESENTATIVES

Page 8102 MR. SABATH. * * * It is true that there are objectionable features, namely, the antibasing point and the classification provisions. But I want to inform the House that the Judiciary Committee has agreed to move to eliminate both of these provisions from the bill. Likewise, if it is shown that other features are objectionable, they may be modified.

* * * * *

Page 8106 MR. MILLER. * * * Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out.

* * * * *

Page 8126 MR. CRAWFORD. I want to touch now on one other thing, and that is with respect to the basing-point provision. A lot of people do not understand the basing-point provision and it is easy to understand why they do not. Lots of products are sold f. o. b. a given point. We will take, for instance, sugar. Sugar is sold f. o. b. New York City. The price today of cane sugar is $5 a hundred f. o. b. New York City, and the price of beet sugar is $4.80 f. o. b. New York City. The processor of sugar beets will receive an offer, we will say, at Saginaw or Bay City, Mich., to sell sugar at Bay City at the New York basis of, say, $4.80. The sugar is invoiced to the Bay City wholesale jobber at $4.80 per hundred pounds, plus the freight rate from New York to Bay City, and the Bay City jobber picks up the sugar at the Bay City processor's warehouse. If the sugar is sold to a customer at Cleveland, the price is $4.80 plus the freight from New York to

Cleveland, and the Bay City processor pays the freight from Bay City to Cleveland. The freight charges from New York to Bay City are much greater than to Cleveland. Also the freight charges from the Bay City processor's plant to the jobber's warehouse in Cleveland
8127 is very high, all resulting in a much higher net for sugar sold and delivered at Bay City than if sold and delivered by the Bay City processor at Cleveland.

* * * * *

MR. FLETCHER. Will this bill remedy that sugar situation?

MR. CRAWFORD. Only in part. It is hoped to remedy the secret rebate I have mentioned. The basing-point provisions are to be eliminated from the bill, I understand.

We are going to strike out of this bill the basing-point provision, and if I had the time I could show you where, if that goes out, it may cost the American sugar growers of this country millions of dollars annually, and I know the figures that I am talking about. However, you cannot keep it in this bill and pass the bill, can you, Mr. Chairman?

MR. MILLER. That is the impression I have.

MR. CRAWFORD. That is right.

MR. MILLER. I agree myself that the basing-point practice that has grown up is indefensible, but I do not believe that can be taken care of in this bill.

MR. CRAWFORD. Neither do I, and I am not going to object to throwing that out of the bill, because we can crawl a little bit at a time and go as far as we can with this bill.

* * * * *

8223 MR. BROWN of Michigan. I want to congratulate the committee for eliminating this provision from the bill at the request of many of us. If the section had remained in, it would be ruinous to small-town industry located some distance from the market.

MR. CITRON. Mr. Chairman, will the gentleman yield?

MR. MILLER. I yield.

Page 8323 (cont.) Mr. Citron. Mr. Chairman, if this provision remains in the bill, it would result in forcing f. o. b. shipping prices on manufacturers; but with this provision eliminated they will not be forced to charge f. o. b. shipping point prices. Otherwise, many would not be able to compete with foreign manufacturers, for instance, from Canada, who would not be subject to this provision if it remained in the bill.

As a member of the Judiciary Committee I voted to eliminate this paragraph, no. 5. I advocated the elimination of this paragraph in the committee, because I considered it would result in a hardship to the manufacturing industry of this country and of my own State.

* * * * *

Page 8224 The paragraph in this bill that we are eliminating is as follows:

> (5) That the word "price" as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed or defrayed by the vendor.

Reasons Against Limiting Manufacturers to F. O. B. Shipping Point Price in Amending Our Antitrust Laws

I believe that there are very important reasons why this paragraph should be eliminated entirely, not only for the reason that there is already under consideration a bill which has separately and wholly to do with the basing-point price method, and on which committee hearings have been held, but also for the reason that the basing-point price method has some economically sound merits, and to prohibit the legitimate carrying on of this pricing system by industries will have serious consequences in many industries doing business within the confines of the United States. There is still a further most important reason why this particular definition of price should be eliminated from the instant bill, which is that it would compel all manufacturers and wholesalers under the jurisdiction

224 of the United States Government to ship all their merchandise on an f. o. b. point of origin basis and the consequences of such a statute would be to place many of our manufacturers and wholesalers at a serious disadvantage when competing with foreign manufacturers and exporters who do business in the United States.

* * * * *

But a more serious consequence of the inclusion of this definition of price, as previously stated, would be to compel all manufacturers to ship f. o. b. shipping point, and therefore compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing costs as the result of seriously limited volume production.

Volume Production

Volume production is the very lifeblood of many types of industries. If the products they manufacture cannot be made in large volume, upon which the low cost is dependent, the cost of the finished product would be so high that it would seriously curtail, if not entirely prohibit, their consumption.

This paragraph would seriously affect the publishers of national magazines, because it may mean that the national publishers cannot sell their magazines not only for the reason that the freight charges on the magazines to distant points will be so great as to prohibit the sale of the magazines at those points, but also for the reason that the magazines are dependent upon advertising revenues derived from national distributors whose operations will be seriously curtailed by this definition of price.

If this paragraph remains in this bill, it will mean the increased centralization of manufacturing in the more thickly populated industrial centers.

Some people say these consequences can easily be offset by manufacturers and wholesalers establishing wholesale-distributing points all over the United States. However, this would mean increasing the number of operations

Page 8224 (cont.) and the amount of handling, all of which entails increased cost which the consumer must pay, and only the larger manufacturers in the country could finance the cost, and it would mean the further submergence of the small industry and the small-business man, which would actually tend to enhance monopoly in all branches of industry.

I Advocate Protection for Connecticut Industry Against Any Unfair Foreign Competition

Another very serious objection to this paragraph is that in many instances our manufacturers and wholesalers would be placed at a serious disadvantage in meeting competition of manufacturers in other countries. Take an instance from my own State—the Scovill Manufacturing Co., a large and old established concern which manufactures thousands of different kinds of metal products, from articles for personal use—such as buttons—to parts to be used in the manufacture of other merchandise. Under the terms of this definition of price in the instant bill, they would be compelled to charge freight from Connecticut to New York City, to Baltimore, to New Orleans, to San Francisco, to Detroit, or to Chicago, just to mention a few major manufacturing centers. A manufacturer in the same kind of business, located in Canada or in Europe, or any other industrial country, and who is not subject to the jurisdiction of our Federal statutes, would be able to deliver his products f. o. b. to every one of these industrial cities which I have mentioned for the reason that they are all direct ports of entry into the United States. By the wording of this definition of price in this paragraph, the Scovill Manufacturing Co. could not meet the foreign competition, nor could any other manufacturer in the United States, under like conditions, meet that competition. The only way open to them would be to set up manufacturing branches in Canada, which would have the effect of further increasing unemployment in the United States.

Because of the reasons that I have given, I also favor the exclusion of this paragraph.